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REDEFINING THE FAMILY: RECOGNIZING THE ALTRUISTIC CARETAKER AND THE IMPORTANCE OF RELATIONAL NEEDS

Beverly Horsburgh*

In *The Fall*,¹ a lawyer who fails to rescue a drowning woman lapses into existential despair over the inherently self-serving nature of human beings, alienated from one another and incapable of altruistic conduct:

Are we not all alike, constantly talking and to no one, forever up against the same questions although we know the answers in advance? Then please tell me what happened to you one night on the quays of the Seine and how you managed never to risk your life. You yourself utter the words that for years have never ceased echoing through my nights and that I shall at last say through your mouth: "O young woman, throw yourself into the water again so that I may a second time have the chance of saving both of us!" A second time, eh, what a risky suggestion! Just suppose . . . that we should be taken literally? We'd have to go through with it. Brr . . .! The water's so cold! But let's not worry! It's too late now. It will always be too late. Fortunately!²

His lament for the state of the human condition is both a personal confession of fear and, in the lawyer's cynical and apprehensive questioning, a revelation of one male response to altruism. It is more than the risk of loss of life that inhibits the lawyer from saving the woman. It is also loss of self. The

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This Article is dedicated to Michael Fischl, who enables his students to understand that law can be an expression of social justice and that caring reaches beyond market preferences.

1. ALBERT CAMUS, *THE FALL* (Justin O'Brien trans., Borzoi Books 1961) (1957).
2. *Id.* at 147.

lawyer's male subjective self is isolated by his perception of relationship as a loss of individuality and threatened by the risks that giving to another entails.³ Fearing self-destruction, the lawyer has no choice but to let the woman drown.

Unlike Camus's lawyer, some women do not experience altruism as threatening. For these women, caring is a natural expression of the self in a relationship. Their identity is shaped and enhanced by experiences of connection, and

3. Scholars have characterized this perception of relationship in a number of ways. Gary Peller describes it thus: "The self does not see itself in the other precisely because the other is an other, an object presenting the threat of objective constraint to the freedom of the self." Gary Peller, *The Metaphysics of American Law*, 73 CAL. L. REV. 1152, 1277 (1985). Roberto Unger notes:

Consciousness implies autonomous identity, the experience of division from other objects and from other selves. But the medium through which consciousness expresses itself is made up of the symbols of culture, and these . . . are irreducibly social. . . .

. . . The more precarious the bonds of common existence and belief . . . the less are they able to express their consciousness through the social medium of symbols, and therefore the less are they secure in the experience of individuality that arises from consciousness. Nevertheless, the more intimate the similarity of experience and reflection among individuals, the less of a basis does individual identity seem to have.

ROBERTO M. UNGER, *KNOWLEDGE AND POLITICS* 215 (1975).

In addition, Duncan Kennedy writes:

But at the same time that it forms and protects us, the universe of others . . . threatens us with annihilation and urges upon us forms of fusion that are quite plainly bad rather than good. . . .

The kicker is that . . . the fashioning of an unalienated collective existence, appears to imply such a massive increase of collective control over our lives that it would defeat its purpose. . . . Coercion of the individual by the group appears to be inextricably bound up with the liberation of that same individual.

Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 205, 212 (1979).

Similarly, conservatives are threatened by theories and systems of distributive justice as invasions of self-boundaries:

Whether it is done through taxation on wages or on wages over a certain amount, or through seizure of profits, or through there being a big *social pot* so that it's not clear what's coming from where and what's going where, patterned principles of distributive justice involve appropriating the actions of other persons. Seizing the results of someone's labor is equivalent to seizing hours from him and directing him to carry on various activities. . . . This process whereby they take this decision from you makes them a *part-owner* of you; it gives them a property right in you.

ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 172 (1974).

their values are frequently centered in an intimate ethos of care and responsibility.⁴ Not all feminists agree that there

4. Carol Gilligan claims that women tend to formulate and resolve ethical decisions in different ways than men, and that Lawrence Kohlberg's theory of moral development, which is based on abstract principles of justice, is too narrow in its definition of moral reasoning. CAROL GILLIGAN, IN *A DIFFERENT VOICE* 1-2, 24-31 (1982). Gilligan interviewed a number of women for her research and at one point noted: "[I]dentity is defined in a context of relationship and judged by a standard of responsibility and care. Similarly, morality is seen by these women as arising from the experience of connection and conceived as a problem of inclusion rather than one of balancing claims." *Id.* at 160. She quotes one of the women interviewed: "By yourself, there is little sense to things. It is like the sound of one hand clapping" *Id.* In a recent study edited by Gilligan, two distinct patterns of moral reasoning are identified: a morality of care or responsiveness to others and a morality of justice or fairness to others. In the caring model, "moral problems . . . emerge from the recognition of . . . fractures in the relationships between people or from concerns that someone has been excluded or not taken care of. . . . [M]oral problems are resolved by stepping into—not back from—the situation and by acting to restore relationships or to address needs including those of oneself." MAKING CONNECTIONS: THE RELATIONAL WORLDS OF ADOLESCENT GIRLS AT EMMA WILLARD SCHOOL 42 (Carol Gilligan et al. eds., 1990) [hereinafter MAKING CONNECTIONS]. In the justice (Kohlberg) model, "moral problems are seen to emerge from the conflicting claims of individuals and to be resolved through objectivity and the application of principles of justice as fairness. Fair treatment and broadly contractual rules and individual rights provide a set of related ideas within this orientation" *Id.* at 41. For surveys of the Gilligan-Kohlberg debate, see Lawrence Blum, *Gilligan and Kohlberg: Implications for Moral Theory*, 98 ETHICS 472 (1988); Owen Flanagan & Kathryn Jackson, *Justice, Care and Gender: The Kohlberg-Gilligan Debate Revisited*, 97 ETHICS 622 (1987). Flanagan and Jackson contend most individuals use both types of reasoning. Different kinds of moral problems require choosing an appropriate orientation to the problem presented. However, "for most individuals one way of seeing moral problems dominates the other way of seeing to some degree, and . . . the direction of dominance is correlated with gender." *Id.* at 625; see also Colloquy, *The 1984 James McCormick Mitchell Lecture: Feminist Discourse, Moral Values, and the Law—A Conversation*, 34 BUFF. L. REV. 11, 48 (1985) [hereinafter *James McCormick Mitchell Lecture*] (Gilligan stating that most people who use both voices tend to focus on one orientation).

Feminist writers have explored the concept of gendered value systems from a variety of perspectives. Seyla Benhabib argues that Kohlberg's definition of the moral domain and his ideal of moral autonomy are similar to the social contract theories of Hobbes and Rawls. All of these theories exclude women's experiences and, therefore, fail in their universalist intentions. Seyla Benhabib, *The Generalized and the Concrete Other: The Kohlberg-Gilligan Controversy and Feminist Theory*, in FEMINISM AS CRITIQUE: ON THE POLITICS OF GENDER 77, 81 (Seyla Benhabib & Drucilla Cornell eds., 1987). Robin West attributes the difference between how men and women define identity to women's potential for physical connection to others, an innate biological determinant. Women carry and bear children, while men, in contrast, are separated physically from the rest of human life. A male's awareness of his isolation from others is an underlying premise of all modern legal theory, creating an essentially masculine jurisprudence. Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 1-3 (1988). West emphasizes the contradictions that lie within both of these definitions of identity. Men celebrate autonomy and fear physical annihilation, while at the same time they long for connection and dread

is a difference in values between men and women, and those who do believe a separate value system exists do not agree on whether it represents an essential gender difference or is the result of cultural conditioning.⁵ Although I do not claim to speak for all women or to describe essential nonhistorical immutable features of womanhood, I believe that the caring ethic is closer to the perspective of the women discussed in this Article than is the law's traditional approach.

In this Article, I examine issues surrounding the caretaker, a recurrent presence in contract, tort, and family law. Believing relational interests are more important than self-interest and unconcerned with economic gain, a caretaker empathetically reacts to another's needs, providing services without protecting herself by negotiating for a return. I argue that the law, reflecting a more typically male value system and method of moral reasoning, a jurisprudence circumscribed by abstract principles of autonomy and reciprocity, suppresses the caretaker's values and denies altruistic caring.⁶ The very

emotional alienation. Women value intimacy and fear emotional separation, yet seek individuation and dread physical invasion. *Id.* at 36-37; see also *infra* note 150.

5. Some feminists have criticized or rejected the notion of gendered values. Catharine MacKinnon, using a Marxian critique of idealism as a model, questions the assertion that there is a fundamental gender difference in moral reasoning and insists that a woman's caring ethic is just another aspect of male domination. The relational perspective is an expression of dependence, not altruism. "Women are said to think in relational terms. Perhaps women think in relational terms because women's social existence is defined in relation to men." CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 51 (1989). Drucilla Cornell rejects West's phenomenology of an essential woman engraved by her biology and reproductive capacity as only a description of woman's situation. Through imagining new myths and metaphors, what she calls ethical feminism, we can create the ideals of the feminine. Drucilla Cornell, *The Doubly-Prized World: Myth, Allegory and the Feminine*, 75 CORNELL L. REV. 644, 646-50, 667-73, 696-99 (1990). Joan Williams sees the caring ethic as dangerous, enlisting women in their own oppression. Women come to believe that they prefer to sacrifice their careers, rejecting individualism and competition in order to raise children. Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797, 830 (1989). Postmodernist feminists reject any claim to knowledge of an essential woman or of values universal to all women, insisting instead that identity is a product of complex, social forces within a particular context, time, and place in history. A particularly good discussion of postmodernism and feminism can be found in Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 877-80 (1990). Black feminists and lesbians criticize the tendency of white, heterosexual feminists to exclude their perspectives and experiences. See generally ELIZABETH V. SPELMAN, INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT (1988); Patricia A. Cain, *Feminist Jurisprudence: Grounding the Theories*, 4 BERKELEY WOMEN'S L.J. 191 (1990); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990).

6. Altruism has as many definitions as there are commentators defining the term. My definition suggests that empathy, the capacity to emotionally identify with

nature of the legal discourse disables the caretaker from expressing her values accurately.

Part I of this Article describes the general nonrecognition of altruism in the law. It then focuses on contract law, discussing cases involving parties who cohabituate without formalizing their relationship in a marriage, and those who are not sexually intimate but are nevertheless interrelated members of an extended family. I argue that when a relationship ends, a caretaker becomes aware of her sacrifice and effort on behalf of another and experiences a sense of loss. However, recovery in contract requires the perverse recharacterization of the parties as self-seeking strangers impersonally bargaining over market services in a commodity exchange. Courts indulge in the legal fiction that the caretaker bestowed services with the expectation of being paid, ignoring the family bonding and commodifying what is an expression of love into the sale of labor.

another person, is the motivating factor behind altruistic behavior. The altruist sees individuals in their own contexts and according to their own needs, rather than assuming others are the same as herself. See MAKING CONNECTIONS, *supra* note 4, at 42, 46. Altruism has been described by Duncan Kennedy as including a "vulnerability to non-reciprocity." Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1718 (1976). For Richard Titmuss, donating blood to an unknown stranger is an act of gifting that comes closest to capturing pure altruism. He investigates the various methods used to obtain and distribute blood, comparing Britain's voluntary social programs with the market system of paid donors in the United States, and argues that voluntary donations further feelings of community while market transactions separate and isolate us from each other. RICHARD M. TITMUSS, *THE GIFT RELATIONSHIP: FROM HUMAN BLOOD TO SOCIAL POLICY* 237-46 (1971). In a truly voluntary donation, "there is no formal contract, no legal bond, no situation of power, domination, constraint or compulsion, no sense of shame or guilt, no gratitude imperative, no need for penitence, no money and no explicit guarantee of or wish for a reward or a return gift." *Id.* at 89. Phillippe Rushton, a behaviorist, defines altruism as "social behavior carried out to achieve positive outcomes for another rather than for the self." J. Phillippe Rushton, *Altruism and Society: A Social Learning Perspective*, 92 ETHICS 425, 427-28 (1982). Dennis Krebs positions altruism within an organized thought system, a cognitive learning approach. Because structures of reasoning progress through orderly stages of intellectual development, one's definition of altruism and its importance as a value change as one achieves more sophisticated levels of thought. Dennis Krebs, *Psychological Approaches to Altruism: An Evaluation*, 92 ETHICS 447, 448 (1982). For instance, at stage five on the Kohlberg scale of moral development, altruism could mean "fostering the greatest good for the greatest number." Dennis Krebs, *A Cognitive-Developmental Approach to Altruism*, in ALTRUISM, SYMPATHY, AND HELPING 141, 155 (Lauren Wispé ed., 1978). Jeffrey Harrison distinguishes between two kinds of altruism. One is based on a hierarchical ranking of values. A moral principle is afforded lexical priority over the lesser value of wealth maximization, stage five on the Kohlberg model. In the second form, a collective goal is internalized as a personal preference. Jeffrey L. Harrison, *Egoism, Altruism, and Market Illusions: The Limits of Law and Economics*, 33 UCLA L. REV. 1309, 1336-38 (1986).

Part II comments on some of the reasons for the law's reluctance to legitimize the nontraditional family and its inability to believe that altruism is a credible explanation for the caretaker's conduct. Compelling the recipient to compensate the caretaker without his having voluntarily assumed the obligation in a contract blurs the bright-line rules defining the family, which separate the private from the public sphere, and imposes a generalized duty of care in the public world. The law guards the boundaries of a divided world because, as a society, we are unable to express a coherent ideology of altruistic collective responsibility. In an impersonal, bureaucratized society, influenced by a philosophy as well as a psychology celebrating a self in separation from others, we have come to believe in the social divisions the law tells us cannot be changed.

Part III argues that the discourse is also an outgrowth of a divided society in which many women identify with their mothers and assume responsibility for child care and housework, while men are raised to earn a living in the market. An individual's sense of self and the self's relationship to others is in part affected by the fact that women assume primary responsibility for child care.⁷ The female child, raised by the same-sex caretaker, internalizes the mother, gradually evolving an experience of self that is subjectively relational. The male, however, is compelled to detach himself from the opposite-sex caretaker at an early stage of development and forms a firmly bounded ego in denial of the maternal bond. Despite the felt need for intimacy, many men perceive connection to others as a threatening invasion of self-boundaries.

7. See NANCY J. CHODOROW, *THE REPRODUCTION OF MOTHERING* 169-70 (1978) [hereinafter CHODOROW, *THE REPRODUCTION OF MOTHERING*]. Nancy Chodorow has provided one possible framework for a feminist jurisprudence. She turns to object relations theory to explain personality and concludes that Freud was wrong in considering the ego development of males and females to be the same. The gender of the primary caretaker influences the female child to experience individuation in a way that is very different from the male. The difference in development is not innate or biological, but is rather socially and psychologically created in the family. See NANCY J. CHODOROW, *FEMINISM AND PSYCHOANALYTIC THEORY* 45-65 (1989) [hereinafter CHODOROW, *FEMINISM AND PSYCHOANALYTIC THEORY*]. Carol Gilligan's theory of a gender difference in moral reasoning can be seen as a logical outgrowth of Chodorow's work. See GILLIGAN, *IN A DIFFERENT VOICE*, *supra* note 4, at 7-8. It is possible that parenting and attachment to the primary caretaker, not genetics, play a major role in psychologically molding an individual's conceptualization of morality.

In the caretaker cases, the genderized difference in outlook can reach an extreme. According to the woman's relational perspective, the recipient is responsible for her economic security. Under a justice model of moral reasoning, however, the only obligations the recipient has incurred are those in a provable contract. It is also possible that the intimate nature of the relationship elicits the male lawmaker's deepest fears. The caretaker is identified with the primary caretaker and the recipient becomes the male child. Expressing the childhood developmental issues of male lawmakers, these cases reflect the primal struggle of a young male to gain independence from the primary caretaker and the resultant fear that interdependence is a regression to childhood, entailing a loss of self. The recipient's need for the caring given by the caretaker is suppressed from the analysis because of childhood longings associating connection with dependency. Fear of self-destruction causes the law to deny altruism and to reconstruct the relationship as a socially acceptable bargain exchange between two mature, autonomous males.

The last part of this Article suggests a solution that is both a legal reform and a structural change. First, I propose that we redefine the family to include the many surrogate parents and siblings who, though not in a sexual relationship with the person receiving their care, assume responsibility for a recipient's daily needs. I also propose that after two years or the birth of a child, cohabitants should be considered formally married. Legal recognition of this relationship enhances the caretaker's self-worth and respects her dignity as a human being. Second, because recognition only places caretakers in the same financial situation that many wives face at divorce, I also suggest a number of divorce reforms to redress the harm of relational loss, suffered by all long-term caretakers whether married in fact or in law. The caretaker's dependence on the relationship should be presumed when determining support and property awards to reflect existing socioeconomic conditions, in which domestic responsibilities are genderized and workplace expectations are not sensitive to the concerns of the family. Finally, to remedy the underlying inequality between men and women and to degenderize the ethic of care, we need to redefine social roles within the family and create an environment in which it is possible for men and women to share parenting responsibilities. A workplace regulated by law to consider the family's needs is a requisite first step in

healing a gender-polarized society. If we work together to redefine the family by including its forgotten members and by facilitating co-parenting, we can express a new collective ethic. As a society, we can choose to value caring more than commerce, enriching our lives as interrelated human beings.

I. THE NONRECOGNITION OF ALTRUISM IN THE LAW

A. *Denial of Altruism in General*

The only relationship in which the law acknowledges and at times compels altruism is in the traditional family, where a shared identity of interest is assumed to be present.⁸ Because giving to a family member inures to the benefit of all within the family unit, caring is not seen as self-sacrificing behavior.⁹ The needs of the individual are subsumed by a greater good. The individualist takes existence outside the family, where the law neither requires nor encourages altruism.

Under the common law there is no general duty to help a stranger in an emergency.¹⁰ The traditional nomenclature

8. Frances Olsen traced the history of laws regulating the family and pinpointed a fundamental market/family dichotomy. In the regime of the family where women generally raise children and take care of the home, conduct between family members is believed to be motivated by affection and a willingness to sacrifice. Altruism is assumed to be the highest value in the family, whereas in the regime of the market—the predominantly male workplace—individuals are encouraged to pursue self-interest. Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1501-05 (1983). Olsen argues that "[t]he morality of altruism has been supposed to animate the family to the same extent that the morality of individualism has been supposed to pervade the marketplace." *Id.* at 1505.

The idealization of the family has led to the law's inability to understand the importance of protecting its vulnerable members. The family is not always a safe repository for love. Murder, incest, assault, and the domination and exploitation of women and children occur in the regime of privacy. For an account of the dark side of family as a patriarchal institution, see SUSAN M. OKIN, *JUSTICE, GENDER AND THE FAMILY* 134-69 (1989) and DEBORAH L. RHODE, *JUSTICE AND GENDER: SEX DISCRIMINATION AND THE LAW* 133 (1989).

9. Paradoxically, sociobiology explains kin altruism as genetically selfish behavior. The tendency to sacrifice for one's relatives is an instinctive genetic survival response to enhance the replication of DNA. RICHARD DAWKINS, *THE SELFISH GENE* 97 (1976); see also Rushton, *supra* note 6, at 428-29. From this perspective, altruism as we usually think of it never exists, not even in the family.

10. See W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* § 56, at 375 (5th ed. 1984) [hereinafter PROSSER & KEETON]; see also *Handiboe v.*

bélittles voluntary caring and indicates an antagonism to the altruist who responds. Heroic rescuers and salvagers must overcome the overt suspicion of officiousness¹¹ and are often characterized as "mere volunteers" or as "intermeddlers."¹² Even if there is no question of unwanted interference, and despite the policy advantages of encouraging assistance in an emergency, there is no recovery in restitution unless rescuers can prove that they are not altruists and that they acted with

McCarthy, 151 S.E.2d 905, 907 (Ga. Ct. App. 1966) (holding that a property owner has no duty to rescue a drowning child); *Hurley v. Eddingfield*, 59 N.E. 1058, 1058 (Ind. 1901) (holding that a physician has no duty to enter into a contract to provide medical care). Many commentators have criticized the principle of nonintervention. See, e.g., Saul Levmore, *Waiting for Rescue: An Essay on the Evolution and Incentive Structure of the Law of Affirmative Obligations*, 72 VA. L. REV. 879 (1986); Jay Silver, *The Duty to Rescue: A Reexamination and Proposal*, 26 WM. & MARY L. REV. 423 (1985); Ernest J. Weinrib, *The Case for a Duty to Rescue*, 90 YALE L.J. 247 (1980). Leslie Bender has developed a feminist's standard of care: a duty to act responsibly with the same care for strangers that we give those we know. Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. OF LEGAL EDUC. 3, 35 (1988).

11. The Restatement of Restitution states in part:

A person who has supplied things or services to another, although acting without the other's knowledge or consent, is entitled to restitution therefor from the other if

- (a) he acted unofficiously and with intent to charge therefor, and
- (b) the things or services were necessary to prevent the other from suffering serious bodily harm or pain, and
- (c) the person supplying them had no reason to know that the other would not consent to receiving them, if mentally competent; and
- (d) it was impossible for the other to give consent or, because of extreme youth or mental impairment, the other's consent would have been immaterial.

RESTATEMENT OF RESTITUTION § 116 (1937).

Officiousness has been defined in terms of four components: unrequested, forced, unbeneficial, and unnecessary. Edward W. Hope, *Officiousness*, 15 CORNELL L.Q. 25, 27 (1929).

12. John Dawson has suggested that the terminology is intended to ameliorate the "beguiling effect of the unjust enrichment principle." John P. Dawson, *The Self-Serving Intermeddler*, 87 HARV. L. REV. 1409, 1409 (1974). John Wade has proposed that the pejorative terms not be used and has defined a more neutral principle of recovery:

One who, without intent to act gratuitously, confers a measurable benefit upon another, is entitled to restitution, if he affords the other an opportunity to decline the benefit or else has a reasonable excuse for failing to do so. If the other refuses to receive the benefit, he is not required to make restitution unless the actor justifiably performs for the other a duty imposed upon him by law.

John W. Wade, *Restitution for Benefits Conferred Without Request*, 19 VAND. L. REV. 1183, 1212 (1966).

the expectation of compensation.¹³ Tort law permits a rescuer to recover for personal injury damages, however.¹⁴ In such cases the focus of the court is on the autonomy of the rescuer, who is compensated because someone interfered with the rescuer's right to be free from bodily harm,¹⁵ not because of the rescue services. Tort law's indifference to the rescuer's lack of a monetary motive is not a validation of altruism, but is rather a recognition of the limit placed on the stretch of the victim's autonomy. That is, a victim's right to pursue self-interest does not reach as far as causing physical harm.¹⁶ Because the victim has negligently created

13. The drafters of the Restatement of Restitution explained:

[A] person who acts entirely from motives of humanity is not entitled to restitution. The fact that the person acting is in the business of supplying the things or is acting in the course of his profession, is evidence of an intent to charge. On the other hand, a non-professional person who gives a comparatively small amount of service normally would be considered as having no intent to charge for the services, in the absence of evidence of such intent.

RESTATEMENT OF RESTITUTION § 114 cmt. c (1937). Physicians and other professionals are therefore more likely to recover than other altruists. *See, e.g.,* Cotnam v. Wisdom, 104 S.W. 164, 165–66 (Ark. 1907) (holding that a doctor may recover in quasi contract for rendering emergency services). If the caring is over an extended period of time or the rescuer is performing another's duty, recovery may be granted. *See* E. ALLAN FARNSWORTH, CONTRACTS § 2.20, at 106 (2d ed. 1990); *see also* Greenspan v. Slate, 97 A.2d 390, 399 (N.J. 1953) (finding that parents who were under a duty to provide medical services to their daughter were liable to a physician for his services).

14. *See* PROSSER & KEETON, *supra* note 10, § 44, at 307–08, § 68, at 491; *see also* Levmore, *supra* note 10, at 898 (pointing out that a rescuer has a better chance of recovering for his injuries if the negligence of the victim, rather than that of a third party, has led to the need for rescue); Wade, *supra* note 12, at 1188 n.26 (noting that several states have enacted legislation providing for government reimbursement to a private citizen injured while attempting to prevent the commission of a crime against the personal property of another).

15. This is subject to the limitation that the rescuer's decision to take the risk was reasonable. *See, e.g.,* Provenzo v. Sam, 244 N.E.2d 26, 28 (N.Y. 1968) (allowing recovery if the rescuer acted reasonably under the circumstances); Ruth v. Ruth, 372 S.W.2d 285, 288–89 (Tenn. 1963) (holding that, under the rescue doctrine, plaintiffs are not guilty of contributory negligence if they acted as reasonable and ordinarily prudent persons would in the circumstances).

16. Duncan Kennedy explains liberalism's justification of the law's position as follows:

The function of law is the definition and enforcement of rights, of those limits on the pursuit of self-interest that distinguish an individualist from a purely egotistical regime. The great preoccupation of individualist legal philosophy is to justify these restrictions, in the face of appetites that are both boundless and postulated to be legitimate.

Kennedy, *supra* note 6, at 1715.

the need for rescue and is at fault, it seems fair to impose compensation as long as the rescuer has acted reasonably.

In their writings, William Landes and Richard Posner argue that rewards for rescue and sanctions for nonrescue would lead to inefficient results, as well as undesirable social behavior,¹⁷ and that altruistic rescuers at times act without the expectation of compensation.¹⁸ However, a rescuer could be afforded the choice to accept or to decline a reward.¹⁹ Quite possibly, heroic rescuers, as altruists, would seldom claim compensation solely for the act of rescue. The loss in time and effort for one's labor is not significant. Heroic rescuers would plausibly seek compensation for injuries or for out-of-pocket expenses. Since negligence is a convenient tool for compensating injury, expenses remain the major uncompensated loss.²⁰ In any case, there is no empirical proof that altruism is increased by a lack of regulation or decreased if it is rewarded and at times required. An efficiency analysis assumes that most individuals value only their own economic well-being and act accordingly, regardless of the law. Such an analysis ignores the influence of the law in shaping a person's values. A sense of community caring can be furthered by a policy of remuneration, emphasizing collective responsibility as a positive social goal. The current state of the law prioritizes

17. Landes and Posner contend that the imposition of liability for failure to aid a stranger will cause some potential rescuers to avoid activities where rescue opportunities are likely to occur, thus decreasing the number of rescues performed. William M. Landes & Richard A. Posner, *Salvors, Finders, Good Samaritans, and Other Rescuers: An Economic Study of Law and Altruism*, 7 J. LEGAL STUD. 83, 120-23 (1978). They also argue against a generalized duty of rescue by supposing that rescuers are motivated by a desire to be recognized as altruists. If a duty were imposed, it would be impossible for a rescuer to prove he was motivated by altruism instead of a fear of liability; thus, liability would reduce the recognition afforded to the rescuer. *Id.* at 124. Their argument presupposes that social approval and glory are the motivating factors for rescue, not caring for another's welfare. For a reasoned response to the other issues raised by Landes and Posner, which also points out the differences between penalties and rewards, see Levmore, *supra* note 10, at 884-86.

18. Landes & Posner, *supra* note 17, at 94.

19. See Levmore, *supra* note 10, at 885-86. Levmore believes large penalties, as opposed to modest rewards, could prove to be a disincentive. On the other hand, the argument that sanctions deter altruism proves too much. Even if it could be demonstrated that imposing liability interferes with pure altruism, we would not decriminalize murder or do away with tortious liability to facilitate volunteerism. *Id.* at 885 n.25. An unregulated society does not necessarily facilitate altruism. Rather, it can lead to social behavior governed by nothing more than survival of the fittest.

20. See, e.g., *Prior Aviation v. New York*, 418 N.Y.S.2d 872, 879 (Ct. Cl. 1979) (denying compensation for a destroyed helicopter to the owner who voluntarily cooperated with the police in rescuing people whose boat capsized near Niagara Falls).

economics over the welfare of the community: unless the victim is a member of the family, the duty to rescue is limited to those who assume the obligation as a term of contract and thus are paid for their rescue services; and to those who stand to gain some form of economic profit from their relationship with the victim.²¹ The imposition of a duty tends to be consistent with principles of enterprise liability, not altruism.

Criminal law draws a critical distinction between defense of others and self-defense. In some jurisdictions, a Good Samaritan who uses force to protect another from harm is not entitled to the privilege of defense of others if the person protected is not able to claim the privilege of self-defense.²² Even the reasonable belief that the victim is an innocent party and not the initial aggressor is not justified.²³ Altruism is criminalized, and good faith intervenors act at their peril.

21. The limitation on rescue reflects an attempt in the late nineteenth century to demarcate purely consensual private law from public regulation:

Contract law thus became the core of the private law system. In this core area, people were free to act in a self-interested manner, without regard to the interests, needs, or expectations of others. . . . The separation of torts and status from contract also served to isolate the few remaining altruistic duties left in the legal system; the duty to affirmatively act to help others absent a prior agreement to do so was restricted to family members and to quasi-contractual relations, such as obligations of common carriers and innkeepers.

Joseph W. Singer, *Legal Realism Now*, 76 CAL. L. REV. 467, 481 (1988) (reviewing LAURA KALMAN, *LEGAL REALISM AT YALE: 1927-1960* (1986)); cf. Levmore, *supra* note 10, at 899-900 (arguing that the growing number of exceptions to the rule of no duty to rescue signals expansion of a duty). Aside from husband and wife and parent and child, a duty to rescue is imposed in some jurisdictions on the following relationships: common carrier and passenger, innkeeper and guest, innkeeper and stranger, employer and employee, ship and crewman, shopkeeper and business visitor, host and social guest, jailor and prisoner, school and pupil, tavern keeper and patron, landlord and trapped trespasser, safety engineer and laborer, physician and patient, psychologist and injured victim of patient, manufacturer and consumer, landlord and tenant, parole board and victim of parolee, and lastly, drinking companions. *Id.* at 899-900 nn.56-75.

22. The rescuer commits a criminal assault in mistakenly attempting to aid another who has been subjected to lawful arrest. See, e.g., *State v. Wenger*, 390 N.E.2d 801, 803-04 (Ohio 1979); *State v. Gelinas*, 417 A.2d 1381, 1386 (R.I. 1980). But see MODEL PENAL CODE § 3.05 (1962) (stating that the use of force to protect another is justified if, among other things, "under the circumstances as the actor believes them to be," the person protected would be justified in using force). Traditionally, the use of force in defense of another was limited to situations where a special relationship existed, such as parent/child or master/servant. *Id.* § 3.05 cmt. 1.

23. See *Wenger*, 390 N.E.2d at 803-04; *Gelinas*, 417 A.2d at 1386. There is a privilege of self-defense, however, for mistakenly but reasonably believing force was needed to save oneself. See, e.g., *People v. Williams*, 205 N.E.2d 749, 753 (Ill. 1965); *State v. Spaulding*, 257 S.E.2d 391, 396 (N.C. 1979).

In the workplace, individuals at times come to the aid of their fellow employees by engaging in protest activities out of a spirit of solidarity and caring. Labor law, however, discounts the possibility of altruism by not protecting the protesting activity from employer retaliation unless it personally benefits the protestors. The Supreme Court interprets "mutual aid or protection" in Section 7 of the National Labor Relations Act²⁴ as protecting only protests undertaken in the protestor's self-interest.²⁵

In constitutional law, the scope of Article III standing in federal court does not include claims filed because of a concern for the rights of others. The "case" or "controversy" requirement is limited to the claimant's own personal injury or "injury-in-fact."²⁶ Standing to invoke the protection of the Fourth Amendment projects an imagery of extreme isolation. There is no right to recover for a search or seizure unless the police unreasonably searched or seized one's own person or property.²⁷

24. The provision states in part: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection" National Labor Relations Act, 29 U.S.C. §157 (1988).

25. See, e.g., *Eastex, Inc. v. NLRB*, 437 U.S. 556, 569 (1978) (holding that union employees who protested the presidential veto of a raise in minimum wage and who earned above the minimum wage level were protected from employer retaliation by the NLRA because they have an interest in a high minimum wage which drives up the wage levels of union employees). For a thoughtful discussion of labor law, solidarity, and altruism, see Richard M. Fischl, *Self, Others, and Section 7: Mutualism and Protected Protest Activities Under the National Labor Relations Act*, 89 COLUM. L. REV. 789 (1989).

26. See, e.g., *City of Los Angeles v. Lyons*, 461 U.S. 95, 106 (1983) (holding that the plaintiff lacked standing because it was unlikely that he again would be subjected to the potentially fatal chokehold); *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 482-83 (1982) (stating a public interest group lacked standing based on a claim of a "shared individuated right to a government that shall make no law respecting the establishment of religion"); *Sierra Club v. Morton*, 405 U.S. 727, 734-35 (1972) (denying standing to the Sierra Club because it failed to allege any direct injury to its members). For a demonstration that Article III standing was not intended historically to be limited to private dispute adjudication, see Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371 (1988).

27. See, e.g., *Illinois v. Rodriguez*, 110 S. Ct. 2793, 2797-98, 2801 (1990) (holding that a woman who was no longer living with her boyfriend could not consent to a search of his premises, but the police officer's reasonable belief that she had authority to consent justified use of the evidence obtained); *Rakas v. Illinois*, 439 U.S. 128, 148 (1978) (holding that passengers in a car lacked standing to object to a search of the car's interior because they did not have a legitimate expectation of privacy in the area searched). An interesting feminist perspective on the Fourth

Even the tax code constrains altruism. The Internal Revenue Code institutionalizes a particular form of giving by allowing income tax deductions only for donations to private foundations or to public charities.²⁸ Contributing money to a hospital is a tax-deductible item, for example, but the very same amount spent on a friend's hospital bill cannot be recouped on an income tax return. The personal nature of giving is not recognized.

Contract law also denigrates the value of gifting. Donative promises are assumed to involve relatively small sums, unworthy of a court's time and efforts,²⁹ and are not enforceable unless the promisor induced the recipient to suffer an economic loss.³⁰ The usual justifications for refusing to honor gratuitous promises denote skepticism and distrust of conduct unmotivated by pecuniary gain. Such promises are regarded as impulsive and occurring in emotional circumstances,³¹

Amendment can be found in Mary I. Coombs, *Shared Privacy and the Fourth Amendment, or the Rights of Relationships*, 75 CALIF. L. REV. 1593 (1987).

28. 26 U.S.C. § 170 (1988); see *Davis v. United States*, 495 U.S. 472, 486 (1990) (holding that a contribution is "for the use of" a qualified organization under § 170 only when the funds are donated in trust for the organization or in some other enforceable legal arrangement).

29. Richard Posner argues the following:

Perhaps, then, the real reason for the law's generally not enforcing gratuitous promises is not a belief, which would be economically unsound, that there is a difference in kind between the gratuitous and the bargained-for promise, but an empirical hunch that gratuitous promises tend both to involve small stakes and to be made in family settings where there are economically superior alternatives to legal enforcement.

Richard A. Posner, *Gratuitous Promises in Economics and Law*, 6 J. LEGAL STUD. 411, 417 (1977). There is an institutional exception for promises made to public charities, however; promises to charities are enforceable without proof that the promise induced the promisee to suffer a loss. RESTATEMENT (SECOND) OF CONTRACTS § 90(2) (1981). The reason for this exception may be that such promises are considered more likely to be concerned with large sums and therefore merit the attention of the law.

30. For example, the Restatement (Second) of Contracts states:

(1) A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

(2) A charitable subscription . . . is binding under Subsection (1) without proof that the promise induced action or forbearance.

RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981).

31. For example, one commentator states:

But since actors involved in a donative transaction are often emotionally involved, and since the donative promisor tends to look mainly to the interests

suggesting that gifting is an irrational act. Instead, commercial transactions dominate the landscape of contracts.

The bargain theory of contract,³² part of a system of rules regulating promises to exchange goods, property, and services in a technologically complex and impersonal society, paints a

of the promisee, an informal donative promise is more likely to be uncalculated than deliberative. Indeed, such promises may raise a problem akin to capacity, because they are frequently made in highly emotional states brought on by surges of gratitude, impulses of display, or other intense but transient feelings.

Melvin A. Eisenberg, *Donative Promises*, 47 U. CHI. L. REV. 1, 5 (1979). The use of the seal, a relatively simple method of providing demonstrable evidence of a donative promise as well as a serious intent to be bound, has passed out of favor in most jurisdictions. *Id.* at 8-9.

In contrast with the common law's approach, many civil law jurisdictions enforce notarized donative promises. See JOHN P. DAWSON, GIFTS AND PROMISES 29-196 (1980) (discussing the French and German codes). The civil law's willingness to enforce donative promises does not necessarily indicate a policy to encourage altruism, however. Dawson compared the common law's refusal to enforce a promise to bestow a gift or undo a fully executed transfer with the civil law's complex system of regulation, and suggested that the civil law's purposes in controlling gifting are to protect the heirs to an estate and to guard against the depletion of the estate's assets. *Id.* at 221-30.

32. The Restatement (Second) of Contracts sets forth, in pertinent part, the modern bargain theory of mutual reciprocal inducement:

(1) To constitute consideration, a performance or a return promise must be bargained for.

(2) A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise.

RESTATEMENT (SECOND) OF CONTRACTS § 71 (1981).

The classic explanation of the meaning of consideration is provided by Williston:

It is often difficult to determine whether words of condition in a promise indicate a request for consideration or state a mere condition in a gratuitous promise. An aid, though not a conclusive test in determining which construction of the promise is more reasonable is an inquiry whether the happening of the condition will be a benefit to the promisor. If so, it is a fair inference that the happening was requested as a consideration.

SAMUEL WILLISTON, THE LAW OF CONTRACTS § 112, at 233 (1920). When the motives are mixed, the law assumes that selfishness predominates. See RESTATEMENT (SECOND) OF CONTRACTS § 71 cmt. c (1981) ("Even where both parties know that a transaction is in part a bargain and in part a gift, the element of bargain may nevertheless furnish consideration for the entire transaction."). As Ian Macneil notes:

[I]f there is one thing that transactionized economics does not tolerate it is altruism in favor of exchange partners. Few things can more quickly mess up economic models than behavior in which market participants fail to maximize transactional utilities. Altruistic behavior as to other participants in the market does precisely that, and is likely to be characterized by microeconomic model builders along with all such failures as "irrational" behavior.

Ian R. Macneil, *The Many Futures of Contracts*, 47 S. CAL. L. REV. 691, 723 n.97 (1974).

particularly bleak picture of human relationships and behavior.³³ Isolated individuals are induced to depend fleetingly on each other to achieve unrelated goals. It is a transient relationship, the result of increasingly specialized modes of production.³⁴ Within the social relationship defined by the theory, each party is unable to understand intuitively or to share in the aspirations of the other. Two market maximizers come together only to be enabled to part company. Although the requirement of consideration serves ostensibly as an objective method to protect autonomy and restrain courts from institutionalizing values, it imagines the furtherance of a person's ends as the only meaningful way to exercise free choice. There is self-determination only if there is self-advancement. Bargain theory denies the existence of altruism without ever explicitly stating that it has done so and without justifying the omission. Self-interest, a subjective, substantive component, is presumed the only rational motivation for a promise or a performance. Consideration remains a fundamental tenet of contract law³⁵ because it has all the earmarks of a natural law, premised on the innate selfishness of human nature.³⁶

33. Many scholars have challenged contract law's hostility to altruism. See Jay A. Feinman, *Critical Approaches to Contract Law*, 30 UCLA L. REV. 829, 839-42 (1983) (arguing that the individualist vision in contract law does not accurately portray society's aspirations and leads to inconsistencies and unanswered questions); see also Kennedy, *supra* note 6, at 1717-22 (arguing that altruism is in constant competition with individualism).

34. Macneil disputes the promissory basis of contract theory and its adherence to a model of discrete and fully negotiated transactional exchanges. He argues that a network of interdependency exists in a postindustrialized society and parties deal with each other for many years, entailing the reinterpretation of contract as a series of long-term relational exchanges not strictly based on monetary quid pro quos. See Macneil, *supra* note 32, *passim*.

35. Grant Gilmore has argued that the doctrine of consideration was an invention of Oliver Wendell Holmes, Jr., whose "analysis of the true meaning of 'consideration' comes forth almost naked of citation of authority or precedent." GRANT GILMORE, *THE DEATH OF CONTRACT* 20-21 (1974). In Gilmore's view, consideration has decreasing importance as the fields of contract and tort "are gradually merging and becoming one." *Id.* at 88.

36. Adam Smith wrote:

But man has almost constant occasion for the help of his brethren, and it is in vain for him to expect it from their benevolence only. He will be more likely to prevail if he can interest their self-love in his favour, and shew [sic] them that it is for their own advantage to do for him what he requires of them. Whoever offers to another a bargain of any kind, proposes to do this. Give me that which I want, and you shall have this which you want, is the meaning of every such offer

In assuming that individuals exist in a state of separation from others, bargain theory limits the possibilities of human relationships and free choice by not acknowledging that there is a chance that we can also appreciate and identify with another's needs. We can, at times, behave altruistically in furtherance of what are believed to be shared and interdependent goals. The contract cases involving caretakers belie the theory's refined tone of social Darwinism. They are living proof of our natural desire for attachment and our innate capacity to embrace another's interests as our own.

*B. Denial of Altruism
in the Caretaker Contract Cases*

One of the most revealing examples of contract's approach to altruistic caring is the classic case of *Mills v. Wyman*,³⁷ in which a caretaker brought a penniless twenty-five-year-old into his home, nursed him, and provided him with shelter until his death. When the youth's father was informed of his son's death, he wrote to the caretaker, promising to reimburse him for his expenses. Subsequently, the father refused to pay for the care.³⁸ Although the caretaker had formed a family relationship with the father and son by responding to the youth's dependency needs, the court unraveled the relational triad created by the parties and recast them as three separate and independent individualists by refusing to enforce the father's promise. The law alienated the closest and most enduring of family attachments, that between parent and child. Father and son were reborn as unrelated strangers. The court would not interfere with the father's autonomy by assuming he valued his son's welfare,³⁹ or disturb the autonomy of the son, who as an adult was considered to be self-reliant and responsible for his own needs.⁴⁰ Although the

ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 14 (Edwin Cannan ed., The Modern Library 1937) (1776).

37. 20 Mass. (3 Pick.) 207 (1825).

38. *Id.* at 209.

39. The court wrote: "It is only when the party making the promise gains something, or he to whom it is made loses something, that the law gives the promise validity." *Id.* at 210.

40. The court explained:

A legal obligation is always a sufficient consideration to support either an express or an implied promise; such as an infant's debt for necessities, or a

court perceived enforcing the promise in *Mills* as an unwarranted public interference with a personal, moral obligation and a private, family concern,⁴¹ the state in effect regulated the family by setting limits on the duty to care for and to be responsible for a child's needs.⁴² The opinion resigns itself to the frailties of human nature. According to the court, the father is morally obligated to reward the caretaker's altruism and can voluntarily take on responsibility for another's needs,⁴³ but the law cannot demand perfection. The rules chosen by the court reflect a normative standard of social behavior, not an ethical ideal:

What a man ought to do, generally he ought to be made to do, whether he promise or refuse. But the law of society has left most of such obligations to the *interior* forum, as the tribunal of conscience has been aptly called.⁴⁴

Actually, the conduct of the parties demonstrated a fatal abundance of altruism. In caring for the youth, the caretaker did not consider himself, while the father's letter of gratitude,

father's promise to pay for the support and education of his minor children. But when the child shall have attained to manhood, and shall have become his own agent in the world's business, the debts he incurs, whatever may be their nature, create no obligation upon the father

Id. at 211.

41. *Id.* at 210.

42. From a historical perspective, *Mills* is not based on modern notions of consideration or on contract but on the distinction drawn in the 19th century between moral duties and legal obligations. English contract law before the 19th century centered on partially executed contracts. Duties arose from receipt of a benefit or another's detrimental reliance. See P. S. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* 184 (1979). A man was also obligated to pay for goods and services received by members of his family and household because he had a legal duty of care towards them. *Id.* at 182-83; see *Jenkins v. Tucker*, 126 Eng. Rep. 55 (1788) (holding a husband liable to his father-in-law for the funeral expenses of his wife). The duty to care for one's children ends at the age of majority; for that reason the father in *Mills* was not liable. *Mills*, 20 Mass. (3 Pick.) at 211-12.

The separation of law from morality is in itself a value statement implicitly linked to contract. The will theory of contract and liability based on a promise—dominant features of the 19th-century classical era—reflect a belief in the value of free choice, well-suited to the rise of an increasingly industrialized society and laissez-faire economy. ATIYAH, *supra*, at 40-41. As a precursor of the times, *Mills* proclaims the new age of individualism, and contractual relationships based on the freedom to choose one's obligations. *Mills* is a transitional case, looking forward to contract and backward to tort.

43. *Mills*, 20 Mass. (3 Pick.) at 210.

44. *Id.*

in which he promised compensation, was not in exchange for the father's own care. Altruism exists in *Mills*. It is the law that is inadequate to recognize it.

Eventually courts were able to devise a workable method to provide compensation for deserving caretakers without acknowledging altruism or interfering with what has become contract's standard technique for protecting free choice, the bargain theory. In *Webb v. McGowin*,⁴⁵ an employee diverted the fall of a seventy-five-pound pine block to prevent it from striking his employer, injuring himself in the process. The employee was permanently disabled, suffering a broken arm and leg and the loss of the heel of his right foot. The employer agreed to care for the employee for the remainder of the employee's life, and paid him fifteen dollars every two weeks for more than eight years. When the employer died, however, his estate refused to continue the payments. The employee sued, claiming he had been promised an annuity for the rest of his life. The court concluded that there would have been a bargain if there had been time for the parties to negotiate, and therefore granted recovery.⁴⁶ The court found a bargain by noting the employer's conduct after the accident and overtly weighing the value of the employee's performance.⁴⁷ Saving the employer's life gratified basic survival needs, and the payment of the annuity for so many years suggested that the employer intended to honor his promise. There is no fear of

45. 168 So. 196 (Ala. Ct. App. 1935), *cert. denied*, 168 So. 199 (Ala. 1936).

46. The court reasoned that "McGowin's express promise to pay appellant for the services rendered was an affirmance or ratification of what appellant had done raising the presumption that the services had been rendered at McGowin's request." *Id.* at 198.

Charles Fried considers the court's finding of a bargained exchange in *Webb* "too strained to repeat." CHARLES FRIED, *CONTRACT AS PROMISE* 32-33 (1981). Fried would enforce donative promises because serious promises create expectations that should be honored. *Id.* at 37. He grounds contract theory in an ethic of respect for individual autonomy, *id.* at 16, and free choice. *Id.* at 20. However, Fried does not sufficiently allow for disparity in bargaining strengths and the degree to which one's socioeconomic position determines one's bargaining power.

47. The court stated, "The averments of the complaint show that appellant saved McGowin from death or grievous bodily harm. This was a material benefit to him of infinitely more value than any financial aid he could have received." *Id.* at 197. As *Webb* illustrates, modern bargain theory inevitably collapses into evaluations of the objective value of the promise or performance or inquiries concerning the subjective intent of the parties. See generally Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997, 1077-78 (1985) (arguing that the court's determination of mutual advantage may end up providing the requisite manifestation of intent to bargain).

imposing an unwanted benefit on an unwilling recipient. As long as the autonomy of the recipient is protected, there is room in contract for compensating services that are performed before a promise has been made.⁴⁸ Restitution affords relief to caretakers who act with the expectation of financial gain and bestow measurable benefits.⁴⁹

48. In contrast with *Mills*, the employer was found to be morally obligated to honor his promise. "It is well settled that a moral obligation is a sufficient consideration to support a subsequent promise to pay where the promisor has received a material benefit, although there was no original duty or liability resting on the promisor." *Webb*, 168 So. at 198.

The moral obligation doctrine emerged in eighteenth-century English contract law as part of a general system of duties imposed by law. Lord Mansfield created the doctrine to cover cases in which a promisor received a benefit and refused to pay. A promise to pay a legal duty (such as a debt discharged by the statute of limitations), an equitable duty (a claim recognized in the Court of Chancery), and a moral duty were equally enforceable, not solely because of the promise, but also because the courts believed the promisor should pay for the benefits or acts of reliance. These cases were eventually overruled in the 19th century. See ATIYAH, *supra* note 42, at 162-64. Although this doctrine was premised on underlying moral duties, enforcing these promises was also a part of the development of a promise-based liability because there was no duty in the absence of a promise. *Id.* at 163-64.

Despite attempts to discredit the doctrine, however, some courts continued to invoke substantive moral consideration. See Stanley D. Henderson, *Promises Grounded in the Past: The Idea of Unjust Enrichment and the Law of Contracts*, 57 VA. L. REV. 1115, 1123-26 (1971). Actually, there is no difference between the moral obligation doctrine and the modern theory of unjust enrichment. Restitution expresses an underlying morality that valuable benefits should not be retained without compensation. There are limits, however, to restitution's definition of morality. Obligations do not extend to benefits bestowed on others, as shown in *Mills*.

49. The Restatement of Contracts states:

- (1) A promise made in recognition of a benefit previously received by the promisor from the promisee is binding to the extent necessary to prevent injustice.
- (2) A promise is not binding under Subsection (1)
 - (a) if the promisee conferred the benefit as a gift or for other reasons the promisor has not been unjustly enriched; or
 - (b) to the extent that its value is disproportionate to the benefit.

RESTATEMENT (SECOND) OF CONTRACTS § 86 (1981).

A promise made after receipt of a benefit is thought to remove an objection which might otherwise bar quasi-contractual relief. See Robert Braucher, *Freedom of Contract and the Second Restatement*, 78 YALE L.J. 598, 605 (1969). The promise serves the same evidentiary function as in pre-19th century contract law. In § 86(2)(b) a court is given discretion to evaluate the content of the bargain to ensure that the promise is commensurate with the value of the services. The court may either honor the promise if it is a fair assessment of the services or disregard it if it seems too generous in light of the work performed. See *infra* note 56 (discussing variations in outcomes, depending on the court's estimate of the worth of the services). In cases in which the caretaker does not claim an express promise, recovery is also the market value of the services whether the legal theory happens to be quasi-contract (implied-in-law) or on the contract (implied-in-fact). In all these

From the employee's perspective in *Webb*, however, the contract is nonreciprocal. It is unlikely he acted with the expectation of a reward, induced to bargain away the heel of his foot and his ability to earn a living in return for an annuity of thirty dollars a month. A rational market maximizer would not increase his survival risks in exchange for a promise of a relatively small amount of money to be paid over time.⁵⁰ The employee was really granted tort compensation in *Webb*.⁵¹ He acted against his own interest, incurring injuries and suffering a serious loss. The employer also acted against his own interest, because he initiated the payments after the rescue occurred.⁵² What was in fact a caring and compassionate relationship between employer and employee was reframed⁵³ as one of self-interest to comport with the rules of bargain. Just as the law estranges a father and son, seeing them as incapable of sharing the same interests, so too it disconnects an employer and employee and

cases, courts measure the extent of the plaintiff's loss in order to quantify the recipient's gain, a tort-based form of recovery. For a discussion of the lack of distinction in restitution between contracts implied-in-fact and quasi-contracts, see Henderson, *supra* note 48, at 1147-48.

50. Richard Posner would enforce the employer's promise because its present value is greater if the promise is legally binding. If not enforceable, the employer might be forced into making a lump sum payment with a lower present value than the promised monthly annuity. See Posner, *supra* note 29, at 49. This analysis is not significantly different from the court's approach in *Webb*. There is an assumption that both parties are better off financially as a result of the commodity exchange and that self-interest motivated the parties into negotiating a commercial bargain. See *Webb*, 168 So. at 198.

51. At the time of the lawsuit, the employee had received his full entitlement of workers' compensation benefits. FARNSWORTH, *supra* note 13, § 2.8, at 58 n.27. The only way for the court to provide further compensation was to find a bargain. Webb was not entitled to recover in restitution because, as a nonprofessional who acted spontaneously, his services are presumed gratuitous in the absence of proof of an intent to charge. See RESTATEMENT OF RESTITUTION § 114 cmt. c, illus. 8 (1937).

52. The executors of McGowin's estate contended that the employer never explicitly promised to pay the employee. Rather, as president of the company that employed Webb, he generously arranged for the employee to receive payments after workers' compensation benefits had terminated. FARNSWORTH, *supra* note 13, § 2.8, at 58 n.27.

53. The facts, the raw data of reality, are not innately ordered, but instead are choreographed by courts and lawyers in a certain time-frame and space, often with the history and circumstances of the parties carefully selected. For an analysis of various interpretive constructs and how they are used to order facts in such a way as to reach the "logical" legal result, see Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591 (1981). See also Jay M. Feinman, *Promissory Estoppel and Judicial Method*, 97 HARV. L. REV. 678, 698-708 (1984).

positions them into fixed social roles, disabling both from coming together in a personal relationship.⁵⁴

In long-term relationships, there is more likely to be a claim for compensation for services than in a case of momentary rescue. The services involve a greater investment of time and effort over a longer period, and loss is more acutely felt when a relationship that has lasted for years finally ends. During the relationship, however, there is little concern with gain or loss, and for that reason the caretakers are altruists.⁵⁵ Personal services that continue for many years are difficult to reconcile with bargain theory. Often care is provided to elderly and/or lonely recipients who eventually die intestate or who fail to mention the caretakers in their wills. Courts are compelled to choose between the competing policies of preventing unjust enrichment and honoring testamentary intent.⁵⁶ Moreover, the caretakers

54. During the colonial period, an employer's duty to his employees was the same as a father's duty to care for his children. A master stood *in loco parentis* to his servants. MORTON J. HOROWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, at 207-08 (1977). As an impersonal factory system gradually replaced personal apprenticeships, the law turned from familial relationships to contract theory, and courts began to rule that employees assumed the risks of injury in exchange for their wages. *Id.* at 208-09. As Richard Fischl has noted:

[T]here is often more to our connection with our working colleagues than the mere fact that we work shoulder-to-shoulder in pursuit of a living; we should expect some measure or mix of love, empathy, solidarity, or commitment to principle to come into play as well.

Fischl, *supra* note 25, at 859.

55. See *infra* text accompanying note 88.

56. Courts vary in whether or not to honor a non-testamentary promise, depending on their evaluation of the service's worth and their degree of confidence in the promisor's subjective intent. The Wisconsin Supreme Court upheld a decedent's \$25,000 promissory note to his caretaker despite the administrator's insistence that the services were worth far less than the face amount of the note. *In re Hatten's Estate*, 288 N.W. 278, 285-87 (Wis. 1939); see *infra* notes 59-65 and accompanying text (discussing *In re Hatten's Estate*). The next year, however, two caretakers, a mother and a daughter, who took care of their son-in-law and brother-in-law, his children, and his home for ten years, were unsuccessful in maintaining that their services were worth more than the notes of \$2,000. *In re Schoenkerman's Estate*, 294 N.W. 810, 811-12 (Wis. 1940). Similarly, in another case a woman for many years provided friendship, housework, meals, and laundry to a boarder who eventually died intestate and without heirs. The caretaker's claim of an oral promise to leave her the entire estate was denied and she was granted \$2,338.00, the reasonable value of her services. *In re Estate of Gerke*, 73 N.W.2d 506, 507, 509 (Wis. 1955). In yet another case, a \$5,000 check given to the caretaker was considered an invalid testamentary transfer. The caretaker, Jean Moore, had taken the elderly woman shopping, done her laundry, occasionally cooked her

in these cases are usually women⁵⁷ whose domestic services, the commodity they provide to the relationship, are considered to be of little or uncertain value. The relationship, as indicated by its duration, is personal—the opposite of a discrete and adversarial negotiation.⁵⁸

In the case of *In re Hatten's Estate*,⁵⁹ Beatrice Monsted befriended and cared for a bachelor friend for twenty-five years. After his death, she filed a claim against his estate to enforce a \$25,000 promissory note. To allow recovery, the court decided that the caretaker acted with the intent and the expectation to be paid.⁶⁰ The material services provided by the woman furnished valuable consideration for the promissory note, despite the woman's testimony which suggests that she acted out of friendship and affection, ministering to the lonely man's need for companionship:

"On one occasion Mr. Hatten came up there and laid down on the studio couch. He claimed his hotel room was very cold and he would be almost frozen. I would start the fire in the fireplace and he would go on the couch and fall asleep. This night I came down in the morning and he was still there. Several times in the evening he would fall asleep and I would let him lie there and would call my son and he would come over. Once it bothered me because he was sleeping so soundly. I called up my son and had him look him over and he said, 'he is having the sleep of his life, let him sleep and I will come over later.' Mr. Hatten was very sensitive. I would have my son drop in, not letting him know he was coming

meals, and visited her on a daily basis. She had looked after her until her death. *In re Estate of Tulley*, 273 N.W.2d 329, 331–32 (Wis. 1979).

57. My research on caretaker cases, comprising more than 150 cases, revealed relatively few claims pursued by men. Males occasionally adopt the role of caregiver, however. See, e.g., *Poe v. Estate of Levy*, 411 So. 2d 253, 254 (Fla. Dist. Ct. App. 1982) (involving a male cohabitant who claimed an express agreement in which he would receive a share in a woman's property in return for providing her personal services); *Twiford v. Waterfield*, 83 S.E.2d 548, 548 (N.C. 1954) (involving a foster son who claimed recovery for the reasonable value of the services rendered to his foster mother).

58. See Macneil, *supra* note 32, at 732–33. The longer the parties are involved with each other, the more the motivations of friendship, altruism, and various psychological and sociological factors enter into the relationship. *Id.* at 733.

59. 288 N.W. 278 (Wis. 1940).

60. *Id.* at 285.

there to take him home. On that occasion he slept on the studio couch in the library.

"I was asked, 'You weren't doing it with the expectation of getting money?' And I answered, 'No sir, I wasn't doing it expecting to receive money at that time, although I felt as though what we did for him I should be paid. I did not feel as though I could afford to take him out in my car as much as I did.'"⁶¹

The caretaker did not expect to profit from the relationship. However, compensation necessitates that the court defend her as a self-interested wealth maximizer, while the dissent argues she acted out of selflessness.⁶² Altruism, a moral norm that many would agree is socially desirable, is placed at odds with justice.

The elderly man in *In re Hatten's Estate* was really considered to be a member of the family.⁶³ As in *Mills*, the law's approach denies de facto kinship. To recognize the true nature of the relationship would oblige the court to acknowledge the woman's lack of self-interest, and, therefore, deny recovery because, under existing law, services are presumed

61. *Id.* at 289.

62. *Id.* at 289 (Fowler, J., dissenting).

63. The court wrote:

It is not disputed that close friendly relations existed between Mr. Hatten and the claimant and her family for more than twenty-five years. During all of those years he frequently was invited to the Monsted home and often went there without formal invitation In many respects, he treated the Monsted home as though it were his own.

In re Hatten's Estate, 288 N.W. at 281.

There are numerous examples of caretakers and recipients forming a family relationship other than that of husband and wife. *See, e.g., In re Estate of Bennett*, 529 P.2d 338, 339 (Colo. Ct. App. 1974) (describing a housekeeper caring for an elderly woman for five years as if she were the woman's daughter); *In re Estate of Milborn*, 461 N.E.2d 1075, 1077, 1079 (Ill. Ct. App. 1984) (reporting that for five years a husband and wife cooked all the decedent's meals, cleaned her home, mowed her lawn, transported her to the doctor, and loved her as a member of their family); *Embry v. Estate of Martz*, 377 S.W.2d 367, 369-70 (Mo. 1964) (stating that a caretaker and her husband took care of an elderly man's house and performed his farm chores for more than ten years, considering him to be an uncle); *Morris v. Retz*, 413 S.W.2d 544, 547 (Mo. Ct. App. 1967) (describing a woman caring for a physician as his nurse and housekeeper, until his death at the age of ninety); *In re Estate of Zent*, 459 N.W.2d 795, 799 (N.D. 1990) (stating that for three years the woman was babysitter to a man suffering from Alzheimer's disease who could not dress himself, bathe, or take his medicine without her help).

gratuitous in the family.⁶⁴ The presumption can be overcome, but only at the expense of separating the relatives into arms-length commercial strangers.⁶⁵ By narrowly limiting the meaning of family and the altruism it stands for, courts avoid a contradiction with the paradigm of the social compact, a public, social world composed of isolated individualists with uncommon, competing interests. As a result, a positive aspect of human nature, unselfish caring, is remodeled to suit a bargain regime premised on the inherently selfish nature of the individual. The bargain reifies what is created by its own terms. It is a procrustean bed, molding the parties and their relationships to fit within its behavioral presuppositions.

If there is a sexual relationship between the parties, a host of gender issues are raised that only are resolved by proof of strenuous and exceptional services, capable of standing on their own apart from the intimate relationship.⁶⁶ *In re Estate*

64. See, e.g., *Neumann v. Rogstad*, 757 P.2d 761, 764 (Mont. 1988); *In re Estate of Steffes*, 290 N.W.2d 697, 702 (Wis. 1980); *Balfour v. Balfour*, [1919] 2 K.B. 571, 577.

65. Specifically, the presumption of gratuity can be rebutted if the services are extremely arduous and time-consuming and the degree of kinship is somewhat distant. See, e.g., *Wilhoite v. Beck*, 230 N.E.2d 616, 620-23 (Ind. App. 1967) (holding that second cousins who lived in the same house for twenty years did not treat each other as family and intended that the services be reimbursed); *In re Estate of Beecham*, 378 N.W.2d 800, 804 (Minn. 1985) (compensating a daughter-in-law for onerous nursing services beyond what is usually owed to a mother-in-law); *In re Estate of Raketti*, 340 N.W.2d 894, 902 (N.D. 1983) (allowing a sister successfully to claim an implied contract with her deceased sister for payment of services because the two had lived apart for many years and each had a separate family life).

Some courts insist on proof of an express contract. See, e.g., *West v. West*, 229 S.W.2d 451, 453 (Ky. 1950). Others allow recovery on an implied contract but require proof by clear and convincing evidence. See, e.g., *Harrison v. Harrison*, 75 So. 2d 620, 623 (Ala. 1954). In service cases between strangers the plaintiff need not prove an expectation of a reward. The law presumes both self-interest and the expectation of compensation if there has been a request for services. The burden to bring forth facts to rebut the presumption is on the recipient who accepted the services. See, e.g., *In re Estate of Steffes*, 290 N.W.2d at 702; *Wojahn v. National Union Bank*, 129 N.W. 1068, 1077 (Wis. 1911). The pervasive influence of the market/family dichotomy is the reason there is no need to prove an expectation of financial gain in these cases, as well as the reason why the caretaker must prove self-interest if related to the recipient or if the parties are living together. See Olsen, *supra* note 8, at 1504-05.

66. Feminist scholars have described the plight of a woman who claims recognition of a contract in the context of a "meretricious" relationship and have brought our attention to the complexity of all social life, part intimate and part commercial. They have underscored both the economic basis of all family relationships, obscured by the family/market dichotomy, and the inability to draw distinct lines between the public and private spheres. For a discussion of cohabitation cases and theories of recovery, see Dalton, *supra* note 47, at 1097-1113; Martha L. Fineman, *Law and Changing Patterns of Behavior: Sanctions on Non-Marital Cohabitation*, 1981 WIS. L. REV. 275, 323-25; Ellen Kandoian, *Cohabitation, Common Law Marriage, and the Possibility of a Shared Moral Life*, 75 GEO. L.J. 1829 (1987).

of *Steffes*⁶⁷ involved a caretaker who lived with a farmer, Virgil Steffes, for approximately six years. Mary Lou Brooks cleaned and cooked, washed and ironed, fixed fences, picked corn, loaded silage, poured concrete, tore down partitions, wrote out checks, and prepared farm machinery for sale. When Steffes was diagnosed with cancer, she drove him to the hospital for twenty-eight consecutive days for his cobalt treatments.⁶⁸ As he lay dying, she refused to allow him to suffer the indignity of a catheter. The caretaker sat beside his bed with a bedpan and if he was unable to use it, changed his sheets and bedclothing. She physically carried him when he could no longer walk. Although he had wanted to financially provide for her and to leave her the house and farm, Steffes died without memorializing his intent in a will.⁶⁹

The court, in affirming the finding of an implied-in-law and implied-in-fact agreement,⁷⁰ neatly severed the relationship into two parts. In its attempt to de-emphasize the relationship's sexual aspects, the court ignored its emotional content and evaluated only the commercial services provided to the farmer.⁷¹ According to the court, the caretaker performed the

Clare Dalton suggests that Carol Gilligan's work on the psychology of moral development and Nancy Chodorow's psychoanalytic theory might provide further understanding of these cases. Dalton, *supra* note 47, at 1112-13.

67. 290 N.W.2d 697 (Wis. 1980).

68. *Id.* at 699.

69. *Id.* at 700. Various witnesses testified that Virgil Steffes intended that Mary Lou Brooks receive his property. However, he sold part of the farm and conveyed an option to buy the farm property to purchasers before he died. *Id.* Even if the recipient does name the caretaker as a beneficiary in his will, she may experience problems because the relationship often influences courts to believe the woman has exercised undue influence. See Joseph W. deFuria, Jr., *Testamentary Gifts Resulting from Meretricious Relationships: Undue Influence or Natural Beneficence*, 64 NOTRE DAME L. REV. 200, 201 (1989).

70. *Steffes*, 290 N.W.2d at 709. The theoretical distinction between consensually based recovery (the circumstances suggest a tacit agreement) and recovery imposed by law (unjust enrichment) blurs in the facts.

71. The court followed the reasoning in *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976). *Steffes*, 290 N.W.2d at 706-08. *Marvin* established that personal services other than sexual services can provide lawful consideration for an express or implied agreement to pool all earnings and share all property acquired. *Marvin*, 557 P.2d at 116. *Marvin* also proposed various other legal theories as grounds for recovery, including implied partnership agreements or joint venture, a constructive or resulting trust, or quantum meruit (recovery for the reasonable value of the services less the reasonable value of support if it is shown the services were rendered with the expectation of financial gain). *Id.* at 122-23.

The court in *Steffes* rejected the personal representative's contention that a presumption of gratuitous services applied because the parties were involved in a close family relationship and that such a presumption only could be rebutted by proof

labors of Hercules out of self-interest. Only because she intended to be compensated for performing the work of a professional nurse and farmhand was she awarded \$14,600, the reasonable value of the services.⁷² A more believable justification for the decision to compensate is Mary Lou Brooks's reliance on Steffes. She assumed that he would provide for her future and she believed that the farm was her home.⁷³

Not all jurisdictions allow a caretaker to recover if there is only a claim of an implied agreement. In *Artache v. Goldin*,⁷⁴ the parties lived together for fourteen years. In that time, the caretaker, Carmen Artache, was a traditional wife, working in the home and raising their four children. She also assisted the recipient, Jerrold Goldin, in his dental practice. Some of the more than \$60,000 she had received through the settlement of a personal injury action and the sale of real property was used as a down payment on the family residence.⁷⁵ Although separated from his wife when the parties began living together, Goldin did not officially dissolve his marriage

of an express contract. *Steffes*, 290 N.W.2d at 702-03. The court stated that it was unnecessary to decide whether a presumption arose. The final determination depends on the circumstances. *Id.* at 703. The trial court determined that despite a loving relationship between the parties, the plaintiff expected payment, and the deceased expressed an intent to compensate her. *Id.* at 704. If a promise to pay can be implied from the facts, "the plaintiff is entitled to compensation regardless of the fact that she rendered services with a sense of affection, devotion and duty." *Id.* The work performed by the plaintiff as housekeeper, bookkeeper, farmhand, and nurse was unpleasant, and some of the labor was commercial in nature. She worked long hours and testified that she expected to be paid. *Id.*

Marvin noted that personal services can be considered contribution for purposes of recovering a proportionate share in the property without presuming a gift is intended: "There is no more reason to presume that services are contributed as a gift than to presume that funds are contributed as a gift; in any event the better approach is to presume . . . 'that the parties intend to deal fairly with each other.'" *Marvin*, 557 P.2d at 121 (Peters, J., dissenting) (quoting *Keene v. Keene*, 371 P.2d 329, 339 (Cal. 1962)). The court's refusal to presume a gratuitous intent in a claim of an implied contract in *Steffes* is in keeping with the *Marvin* court's broad principle of honoring the equitable and legitimate expectations of trading parties, despite the presence of an intimate relationship. The approach in *Steffes*—traditional commercial interest analysis—furnishes a solution to the problem of quasi-family status. There is not enough family to allow for a claim to share in the assets of the estate at death, but there is too much family to demand recovery in contract for services rendered.

72. *Steffes*, 290 N.W.2d at 698.

73. She testified that she did not expect compensation for her work but that she did expect to receive something from the farmer. *Id.* at 710 (Coffey, J., dissenting).

74. 519 N.Y.S.2d 702 (App. Div. 1987).

75. *Id.* at 704-05.

until he decided to end his relationship with Carmen Artache. He left the residence they shared, disavowed paternity, and served Carmen Artache and the children with a ten-day notice to quit the premises.⁷⁶ The caretaker claimed an oral partnership agreement in which she and Goldin agreed to live together and hold themselves out as married. She also claimed that he had promised to divorce his wife and share the profits of his practice and other business interests if she would raise the children, take care of their home, and work in the office.⁷⁷ The court deferred to the state legislature and refused to recognize the right to compensation based upon an implied agreement to live together outside of wedlock.⁷⁸ Carmen Artache was allowed to proceed to trial to prove an express agreement entitling her to the reasonable value of her domestic and dental assistance services, less any salary received.⁷⁹ The court also denied an action for intentional infliction of emotional distress because of the nature of the relationship.⁸⁰ Carmen Artache was not enough of a wife to acquire a share in marital assets⁸¹ but was too closely related to sue for the pain she suffered over the loss of her family, her home, and her financial security.⁸² Caught

76. *Id.* at 705.

77. *Id.* at 704.

78. *Id.* at 706. The court further cited to the *Morone* case. See *Morone v. Morone*, 413 N.E.2d 1154, 1157 (N.Y. 1980) (stating that in the absence of an express contract it is reasonable to assume the services are gratuitous because of the close relationship). The framing of the relationship as one between intimates precludes courts from inferring an arms-length commercial contract. "[C]onduct that in other circumstances would give rise to an implied-in-fact contract is instead attributed to the relationship." Dalton, *supra* note 47, at 1098. Some jurisdictions, however, do allow an action for an implied-in-fact agreement if it is based on commercial services, not housework. See, e.g., *Carnes v. Sheldon*, 311 N.W.2d 747, 751-52 (Mich. Ct. App. 1981).

79. *Artache*, 519 N.Y.S.2d at 706.

80. *Id.*

81. Instead, as parties in a fiduciary relationship, a constructive trust could be imposed to protect her interest in some of Goldin's assets, including the home held in his name. The trial court was also directed to entertain her paternity and child support claims. *Id.*

82. The relationship between cohabitants is frequently construed as both too public and too private for court intervention. See Dalton, *supra* note 47, at 1098-1100 (deconstructing the various private/public law arguments used to deny recovery to cohabitants and arguing that they are inconclusive); see also Kandoian, *supra* note 66, at 1839-40 (discussing the indeterminacy inherent in cohabitation disputes). The application of any existing source of authority, be it family law or contract law, is subjective. How the relationship is framed is not governed by a set of rules. The parties' intent to contract or the legislature's intent in abolishing common-law marriage cannot be divined.

between public laws regulating the family and private rules of contract and tort, the caretaker is dispatched to somewhere in the middle—quantum meruit.⁸³

Steffes and *Artache* avoid recognition of the nontraditional family, and, implicitly, morally condemn nonmarital intimacy by enforcing only the legitimate commercial expectations of parties who, as business partners, just happen to live together. Any severable portion of the contract supported by independent consideration other than sexual services is enforceable.⁸⁴ An alternate approach, taken by some courts, is to include the sexual services in the agreement as long as they are not the only or primary consideration.⁸⁵ Both methods, although sensitive to contemporary mores and careful not to equate a nonmarital relationship to prostitution, nevertheless assume there is a sexual quid pro quo, whether it is compensable or not. Illicit commerce is taking place.

Neither approach recognizes that the caretaker's services (sexual, emotional, domestic, or otherwise) cannot be apportioned or ranked as disjointed items. They are incapable of being unfastened from the moorings of the relationship as disassociated and viable commodities. Rather, the services are natural expressions of caring, and create the very fabric of an intimate relationship. A caretaker only incidentally provides market services, often acting in response to the affective need to be emotionally connected to another human being. Nevertheless, courts transform the relationship into a discrete impersonal commodity exchange, discounting its real value, the caring. The commercial ware that the recipient barterers for is housework, for which there is an unestablished fair market value.

The analysis in the caretaker cases proceeds as if dominion and control over a commodity—labor—has passed from the

83. I spoke with Albert Silbowitz, one of the attorneys on the case, who informed me that the parties still await a trial date. Carmen Artache became emotionally upset when she arrived at the blood lab and refused to allow her children to submit to blood tests to determine paternity. Her claim for child support has been dismissed. Telephone Interview with Albert Silbowitz, Attorney for Jerrold Goldin (Oct. 22, 1991).

84. *Artache*, 519 N.Y.S.2d at 706.

85. See, e.g., *Latham v. Latham*, 547 P.2d 144, 147 (Or. 1976) ("The agreement . . . contemplated all the burdens and amenities of married life."). Minnesota has recognized written agreements between cohabitants by statute. MINN. STAT. ANN. § 513.075 (West 1990). New Hampshire considers three years of cohabitation to be a legal marriage. N.H. REV. STAT. ANN. § 457:39 (1983). A few jurisdictions still refuse recognition of any contract claim. See, e.g., *Rehak v. Mathis*, 238 S.E.2d 81, 82 (Ga. 1977); *Hewitt v. Hewitt*, 394 N.E.2d 1204, 1211 (Ill. 1979).

possession of one individual to another. Moreover, the act of transferring labor is isolated out of context as occurring at an identifiable moment, separable from the parties and their past and future relationship.⁸⁶ At that moment, courts attempt to plumb the caretaker's subjective state of mind in order to discern whether she contemplated a return. In reality, the caretaker does not transfer the possession of a fungible item in one concrete instance, but over time gives of herself by bestowing care. Because her behavior is kinetically tied to the tenor of the relationship, she is motivated by relational interests, not self-interest. It is not a promise of economic gain that causes her to care for the recipient; she acts out of love.⁸⁷ For that reason, her conduct is altruistic.⁸⁸

It is not difficult to reconstruct the real world scenarios reflected in these cases. The caretaker is lulled into a feeling of economic security. It seems natural to confine her interests to the home, leaving business affairs in the hands of the recipient. She mistakenly relies on his verbal assurances and behavior, both of which suggest an intent to provide financially for her future.⁸⁹ What is missing is negotiation,

86. See *supra* note 53 for an analysis of the "framing" of facts; see also Coombs, *supra* note 27, at 1632-35.

87. Given the socioeconomic dependency of women, contracts in which they agree to exchange domestic services for economic security are likely to occur. Nevertheless, I believe that even in these cases some women are more likely to conceptualize their relationships as built on altruistic caring and giving because that is the way they subjectively experience them. Case law provides evidence that women in these contexts do not always think in transactional terms. See, e.g., *Kozlowski v. Kozlowski*, 403 A.2d 902, 906 (N.J. 1979) (upholding an express promise to support the caretaker after fifteen years of living together during which the caretaker was unaware of the promisor's business interests or the worth of his assets and had no possessions other than what he had given her).

88. In suggesting that the caretaker is an altruist, I do not attempt to recreate the family/market dichotomy elegantly explained and criticized by Professor Olsen. See Olsen, *supra* note 8, at 1499-1500. I simply argue that caretakers do not necessarily think contractually. As Professor Olsen maintained in her article, there are no hard and fast rules in life governing boundaries on motivation. See *id.* at 1522-24, 1563-67.

89. See, e.g., *Williams v. Mason*, 556 So. 2d 1045, 1047 (Miss. 1990) (concerning a caretaker who lived with the recipient for twenty years after he promised "that, if she would live in his home and do his bidding, at his death she would take all of his property"); *Johnston v. Estate of Phillips*, 706 S.W.2d 554, 556 (Mo. Ct. App. 1986) (concerning a caretaker who stayed with the recipient for ten years, where the recipient stated before various witnesses that "[i]f something happens to me Margaret will be taken care of. . . I have provided for Margaret when I am gone."); *Kinkenon v. Hue*, 301 N.W.2d 77, 79 (Neb. 1981) (concerning a fifty-two-year-old woman who lived with the recipient for seven years and testified that she agreed to move to the farm because the "appellant stated that he had the means and would take care of and

an expression of self-interested commercial foresight and the crux of an impersonal market exchange.

When the relationship ends and the parties are no longer emotionally interconnected, the caretaker becomes aware of her sacrifice and effort to benefit another and experiences a sense of loss. The time she spent caring for the recipient was given at the expense of skills she could have acquired, money she could have earned, and financial security she might have obtained. To the caretaker, justice requires that the recipient be held responsible for her loss because they were in a relationship. Believing that a relationship is more important than abstract rights, and that obligations extend past narrow principles of reciprocity, a caretaker is unable to express herself in language that a court would understand. In fact, her work in the home without pay, foregoing other economic opportunities, could leave her without the financial resources necessary to pursue a lawsuit. Her values and her social situation work against her economic long-term interests.

If the caretaker is financially able to bring an action against the recipient or his estate, she must allege a contract. Courts do not understand the caretaker's relational perspective and ethic of care, her dependence on someone else to take responsibility for financial needs. Instead of acknowledging the caretaker's altruism, her economic dependency, and the recipient's emotional needs, courts insist on positioning the parties within a bargain exchange. They are transformed into adversarial strangers, dealing with each other across a bargaining table and tenuously linked through the formalized mechanism of mutual inducement, instead of intimates who have bonded together to create a family. The finding of a bargain exchange commodifies what is an expression of the caretaker's self in a relationship into the transference of a thing—labor.⁹⁰ The court denies that which is most personal

provide for her for the rest of her life"); *McCullon v. McCullon*, 410 N.Y.S.2d 226, 233 (Sup. Ct. 1978) (finding that the recipient's twenty-eight years of supporting the caretaker, and his statement "that he would always care for her, resulted in her forbearance of employment and providing household services for him"); *York v. Place*, 544 P.2d 572, 573 (Or. 1975) (finding that "decendent had stated to other persons that at his death the farm would go to plaintiff"); *Knauer v. Knauer*, 470 A.2d 553, 555 (Pa. Super. Ct. 1983) (concerning a recipient who told the caretaker "I will take care of you the rest of your life. We will share everything together. And at the end of one year, if we are still compatible, we would plan to marry.").

90. For a discussion of the commodification of personal attributes focusing on surrogate mothering and prostitution, see Margaret J. Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1921-36 (1987).

and definitive of the self: the capacity to love and to take care of another. It alienates people from the very qualities that distinguish us as human beings. Both persons become dehumanized, separated from their personal characteristics as well as from each other.

As Margaret Radin points out, individualism is premised on conceptualizing each person as an abstract, autonomous agent, emphasizing our differences, but equality is achieved by eliminating those personal qualities that define each individual as unique. Once personal traits are disconnected from personhood, it becomes easier to perceive them as mere items, possessions that can be severed and alienated away.⁹¹ The person is estranged from the self. In these cases, the law's reluctance to accept the parties in their real social context violates that which forms the personality and enables personhood to thrive: the capacity to become emotionally involved with another. Empathy, experiencing another's needs as a part of the self, is integral to the concept of personhood.

A court sympathetic to the caretaker's financial plight has no choice but to misstate the relationship in order to avoid compensating services which are the legal equivalent of a gift.⁹² To ensure that the bestowal of services was not the fully executed delivery of a gift, the caretaker must have acted with the purpose of receiving a monetary gain. Reciprocity also requires that the services be valuable. Value depends on the nature of the relationship. If the services cannot provide consideration because they are evaluated as gratuitous or illegal, any express promise of payment is only an unenforceable promise to bestow a gift. A court will not find an implied promise of compensation and an expectation to be paid because of the characterization of the relationship.⁹³ Under this system, the only way to establish value and allow for

91. *Id.* at 1897.

92. See RESTATEMENT (SECOND) OF CONTRACTS § 86(2)(a) (1981) (denying compensation if the benefit was bestowed as a gift). Enrichment is not "unjust" if the benefit is intended to be a gift. In such an instance, there needs to be a finding of an intent or expectation to be paid even if there is proof of an express promise of payment. See RESTATEMENT (SECOND) OF CONTRACTS § 86 cmt. e (1981); see also Wade, *supra* note 12, at 1183.

93. See *Artache v. Goldin*, 519 N.Y.S.2d 702, 706 (App. Div. 1987) (noting that the state does not recognize the right to receive compensation based on an implied agreement to live together outside of marriage); see also Dalton, *supra* note 47, at 1017 (commenting on the refusal to infer an implied contract from the behavior of the parties in these cases, although the same behavior usually suggests a contract outside the family setting).

recovery is to dismember the personal. Love is commodified into a commercial exchange of services for money. If we think in terms of a gift/bargain dichotomy, the analysis seems appropriate, even inevitable. The services either are freely bestowed, with no monetary expectations, or are part of a reciprocal exchange.

But if the court casts aside the dichotomy, it could compensate the caretaker by frankly acknowledging that she acted altruistically, depended upon the recipient for her economic security, and suffered a loss.⁹⁴ Theoretically, altruism could be worthy of a reward. Rewarding altruism, however, requires an understanding of the selfless and sympathetic nature of the caretaker's motivation and her vulnerability, along with an appreciation of the recipient's affective needs. In other words, recognizing her loss and the connection between the parties is an admission of the reality of the relationship. Such an

94. See RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981). Section 90(1) grants compensation if a promise induces a party to suffer a loss, as long as the promisor could reasonably expect the party to rely on the promise. The caretaker's reliance, however, would not be considered reasonably foreseeable to the recipient in these circumstances. A reasonable person would not rely on assurances of security if unmarried. Besides, the assurances of the recipient do not literally induce the services if the caretaker acts out of love and not to secure her economic future. Promissory estoppel usually requires a close nexus between the promise and the resulting acts of reliance. See, e.g., *Hayes v. Plantations Steel Co.* 438 A.2d 1091, 1094-95 (R.I. 1982) (stating that the promise of a pension did not cause the employee to retire as the employee had already decided to leave before the promise was made). A caretaker would also face great difficulty in proving an explicit promise. Often, the caretaker relies on the recipient because of his behavior over the years more than any clear promise or definite form of words. But see *Feinman*, *supra* note 53, at 692-93 (pointing out that a promise need not always be expressly stated and is frequently implied in construction bidding cases). The traditional measure of recovery for detrimental reliance is no different, however, than what the caretaker is now entitled to claim, which is the reasonable value of the services. Her expectation that the recipient would provide for her future and that the relationship would last would not necessarily be honored. But see *id.* at 687-88 (arguing that courts frequently honor the expectation interest in business cases in which there is a claim of detrimental reliance). Also, a court might not recognize lost opportunities, such as the income she could have earned or the skills that she might have acquired. See FARNSWORTH, *supra* note 13, § 12.1, at 843 (stating that reliance losses do not traditionally include lost profits or lost opportunities). Courts have at times recognized foregone opportunities under § 90, however. See, e.g., *Grouse v. Group Health Plan, Inc.*, 306 N.W.2d 114, 116 (Minn. 1981) (holding that a man who had quit his job and declined another offer of compensation based upon a company's offer of employment was entitled to damages when the company rescinded its offer). Some courts refuse recovery. See, e.g., *Clark Oil & Ref. Corp. v. Leistikow*, 230 N.W.2d 736, 744 (Wis. 1975) (holding that defendants who had quit their jobs after signing an agreement with the plaintiff could not raise the doctrine of promissory estoppel after the plaintiff terminated the agreement); FARNSWORTH, *supra* note 13, § 3.25, at 202 n.19 (collecting cases).

acknowledgement legitimizes the nontraditional family. Courts prefer to adhere to equivocations over gift/bargain distinctions, resorting to a convoluted and patently unbelievable analysis of the caretaker's motivation and the nature of the relationship. The law's perception of the parties as emotionally self-sufficient and detached individualists is in turn shaped by a complex array of psychological and sociological factors, as well as cultural values, that enter into the decision-making process.

II. THE LAW'S CONCERN WITH AUTONOMY AND DISBELIEF IN ALTRUISM

Courts insist that the parties in all these cases are contracting partners in a bargain exchange because admitting to the relationship's personal aspects implicitly recognizes the nonconventional family. The reasons for upholding bright-line rules defining the family reflect more than just a concern with conventional morality or a belief that the legislature is the appropriate forum to legitimize social relationships. There is a subtle interplay between the law, cultural values, and relationships between individuals in society. The ways in which we think are influenced and defined by the ways in which we live. At the same time, the ways in which we live are affected and created by laws that are a result of cultural attitudes. In giving expression to a specific culture's ideology, law both comments on it and is determined by it. In the caretaker cases, the relationship of the parties is shaped by a legal doctrine that is affected by a socially created ideology.

The growth of industrialized society, continuing the genderized division of labor, has led to the development of a world divided by the social functions performed. The polarization of the social world into the family and the market, in turn, has bred dual and conflicting value systems.⁹⁵ Each is believed to be inherent to its respective sphere. The highest ethic in the family is the altruistic collective, whereas in the market,

95. See Olsen, *supra* note 8, at 1499-1501 (discussing the separation of the family—the woman's workplace—from the male marketplace and the growth of two distinct moralities); see also Lucinda M. Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118, 1118-19 (1986); Williams, *supra* note 5, at 823-25.

individualism governs behavior and comprises enlightened self-interest. Justice in the market sphere consists of the liberty to pursue one's own substantive needs and one's own conception of the good life, limited by procedural principles of reciprocity and cooperation.⁹⁶ The ideal of law is neutrality. Law's purpose is to prevent harm by ensuring that all members of the community are represented in the process, not to force substantive choices such as the bestowal of benefits or sacrifice for the sake of others.⁹⁷ In the public world, we are free not to care for each other⁹⁸ unless we choose the obligation by entering into a contract.

A. Caretakers and Altruism

In all of the caretaker cases, the parties are in legal limbo. They are neither commercial strangers, nor formally married, nor genetically related. Instead of opening up the definition of a family and allowing it to expand into the public sphere, the law requires proof of contract to prevent encroachment on the autonomy of the recipient. In a polarized world, compelling the recipient to pay without a voluntary assumption of a

96. For instance, John Rawls hypothetically places individuals behind a "veil of ignorance" in order to reach a consensus on principles of justice uncontaminated by self-interest resulting from ability, strength, or socioeconomic position. JOHN RAWLS, *A THEORY OF JUSTICE* 12, 136-42 (1971). Rawls ignores gender and a social self, forged by one's life experiences; yet values are socially constructed and cannot be derived from a decontextualized, intrinsic self.

Ronald Dworkin stresses "political integrity" as an important virtue of political structure. RONALD DWORKIN, *LAW'S EMPIRE* 164-65 (1986). According to Dworkin, political integrity "requires government to speak with one voice, to act in a principled and coherent manner toward all its citizens, to extend to everyone the substantive standards of justice or fairness it uses for some." *Id.* at 165. Dworkin sees the value of integrity as confirmed "when people in good faith try to treat one another in a way appropriate to common membership in a community . . . and to see each other as making this attempt, even when they disagree about exactly what integrity requires in particular circumstances." *Id.* at 190. The ideal of integrity, however, does not sufficiently allow for the recognition of gender-structured social institutions, and is too vague to yield concrete results in individual cases.

97. One classic expression of a process-oriented theory is JOHN H. ELY, *DEMOCRACY AND DISTRUST* 73-104 (1980) (discussing a process-oriented approach to constitutional problems, such as that exemplified by the Warren Court, and contrasting it with the more traditional, value-oriented approach).

98. Charles Fried argues, "[R]elations within a family must be governed by an altruistic spirit Where the sharing is mandated by a higher authority it becomes despotism." FRIED, *supra* note 46, at 90.

contractual obligation looks like an illegitimate interference with personal freedom. If the definition of a family depends on a factually sensitive analysis, however, it becomes more nebulous, and anyone could be held responsible for another's well-being. The advantage of maintaining bright-line rules defining the family and a divided social world is that we produce a clear line delineating individual responsibility. Legitimizing nonmarital intimate relationships and compensating caretakers blur the two social worlds and impose what amounts to a generalized duty of care in the public sphere. A court would hesitate to take this approach, fearing that it would be accused of institutionalizing values, substituting its own instead of furthering those of the parties.

Yet law itself fashioned the public/private dichotomy. The background of court-created existing rules and values inevitably affects and regulates the most intimate areas of our lives. Law is a power structure that shapes and legitimizes social relationships through the granting or withholding of recognition. Legal recognition of the unconventional family is not a new form of coercion; it acknowledges the reality that human beings at times form nontraditional family-like relationships, and treats them like families.⁹⁹ As it stands, the courts have made a value choice to ignore many women's values, prioritize a social division, and discount the possibility of altruism as well as the importance of relational needs.

The private/public dichotomy also incorrectly presumes an ideal private world of family in which each person's emotional needs are gratified. Typecast in this manner in the private sphere, the public person takes on the attributes of the individualist, entering into a relationship with a stranger only to satisfy material interests. By segregating the desires and

99. The artificial distinction of family/contract is highlighted in the doctrine of the putative spouse. Justice Tobriner in *Marvin* pointed out that a putative spouse in some cases need not prove a monetary expectation in order to recover the reasonable value of the services, contrasting the difference in legal treatment between putative and non-marital relationships. *Marvin v. Marvin*, 557 P.2d 106, 118 n.14 (Cal. 1976). If the caretaker is not aware of the relationship's true status, the law assumes and allows for altruism. If there is guilty knowledge, however, the very same conduct must be characterized as commercial in order for compensation to be justified. See, e.g., *Carnes v. Sheldon*, 311 N.W.2d 747, 752 (Mich. Ct. App. 1981) (stating that a woman who had known that she was not legally married and had performed only domestic services was not entitled to an equitable division of property).

interests of the public person from the private, however, courts implicitly condone exploitation and abuse in the traditional family. Courts also disregard the fact that the family is not necessarily successful at meeting each member's psychological needs. Frequently a caretaker becomes a surrogate family for a lonely recipient because the real family lives at a distance or neglects its responsibilities.¹⁰⁰ Many people outlive their relatives and find that they are alone in the last years of their lives. Naturally they seek affection and companionship, often in nontraditional ways. For example, nonmarital cohabitation is not uncommon among the retired.¹⁰¹ Same-sex couples are prevented from marrying because marriage is defined as a status exclusively between two opposite-sex persons.¹⁰²

100. For example, in *In re Estate of Tulley*, Theresa Tulley had depended on Jean Moore for shopping, for help in cleaning her apartment, and for ordinary friendship. 273 N.W.2d 329, 331 (Wis. 1979). Before she died, Tulley "told her landlord more than once that she did not know what she would do without the claimant's help." *Id.* at 331. In another case, *In re Estate of Steffes*, Mary Lou Brooks, not the farmer's son and grandchildren, cared for Virgil Steffes throughout his long and difficult illness. 290 N.W.2d 697 (Wis. 1980); see *supra* text accompanying notes 67-73. Nevertheless, she was not legally entitled to a share in the assets of the estate. *Id.* at 699.

101. See Mary Ann Glendon, *Marriage and the State: The Withering Away of Marriage*, 62 VA. L. REV. 663, 686 (1976); see also Grace G. Blumberg, *Cohabitation Without Marriage: A Different Perspective*, 28 UCLA L. REV. 1125, 1149 (1981) (discussing the economic incentive for cohabitation among aged widows prior to the changes in the social security laws). However, other potential barriers to marriage still remain. A widow who wishes to preserve her entire estate for her children might not remarry if she lives in a jurisdiction that permits a surviving spouse to elect a statutory share in the estate. See, e.g., FLA. STAT. § 732.201 (1991). For a discussion of the many reasons for informal marriage, see Glendon, *supra*.

102. See, e.g., *Jones v. Hallahan*, 501 S.W.2d 588, 589-90 (Ky. 1973); *Baker v. Nelson*, 191 N.W.2d 185, 186-87 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1972).

Deborah Rhode estimates that lesbians are two to five percent of the adult female population and that homosexuals constitute five to 13 percent of all male adults. RHODE, *supra* note 8, at 141. Although no jurisdiction currently permits same-sex couples to marry, some cities have passed domestic partnership ordinances which give some formal recognition to these relationships. Note, *Looking for a Family Resemblance: The Limits of the Functional Approach to the Legal Definition of Family*, 104 HARV. L. REV. 1640, 1658 (1991). In the past, government population surveys have not gathered statistics on the number of gays and lesbians living together in long-term relationships; thus, it is difficult to obtain an exact count. *Id.* at 1640 n.4. Nonetheless, many sources suggest that the number is rising. *Id.* The number of unrelated, opposite-sex couples is also on the increase. *Id.*

Some individuals prefer not to marry because of the stereotypical gender roles associated with traditional marriages. *Id.* at 1658 n.96; David Meade, *Consortium Rights of the Unmarried: Time for a Reappraisal*, 15 FAM. L.Q. 223, 233 (1981). Some see marriage as a social institution to be a perpetuation of patriarchy. See RHODE, *supra* note 8, at 133-34; see also Cain, *supra* note 5, at 212 (stating that, in their private lives, lesbians are free from male domination).

Some women fear loss of alimony or temporary support if they should remarry.¹⁰³ Informal marriage has become more socially acceptable and commonplace among college students and those in the workforce.¹⁰⁴ There are multiple variations of the family for many reasons in the messy, fuzzy, non-Westlaw world. But few of these alternatives are defined and made real in law.

The law's refusal to expand the meaning of family and to break down the boundaries of the divided social world sustains the notion that the individual is at the core self-serving and incapable of promoting another's welfare or of acting to relieve another person's pain. We fail to see the many examples of lifestyles which suggest that solitude is not the normal state of human existence. Human nature is poorly defined by the paradigm of the individualist armed with rights. As human beings, we prefer interrelationship. Providing care is one way in which we form relationships and is a natural response to fundamental human needs.

If a court is willing to collapse the rigid boundary between family and contract relationships, it would impliedly admit to the presence of altruism outside of husband/wife and parent/child relationships. However, the law has a problem with altruism as well as a concern with autonomy. Altruistic motives are not considered a credible explanation for human behavior,¹⁰⁵ except

103. In some jurisdictions, cohabitation also results in the loss of alimony. *See, e.g.*, OKLA. STAT. tit. 43 § 134(D) (Supp. 1990); UTAH CODE ANN. § 30-3-5(6) (1989); *see also* Glendon, *supra* note 101, at 690 n.116 (collecting cases).

104. *See* Glendon, *supra* note 101, at 686. Glendon states that:

Cohabitation has become a significant fact of life in sectors of society where before, if it existed at all, it was carefully concealed. . . . [M]ost informal marriages in the . . . past . . . have been confined to intellectual elites and to . . . the poor, racial and ethnic minorities for whom the structures of traditional marriage and divorce law sometimes have been irrelevant

Today, however, informal marriage is increasingly common among other social groups and, perhaps more significant, increasingly accepted.

Id. at 685-86.

Approximately two million or more couples live together in de facto marriages. *See* deFuria, *supra* note 69, at 208-09 (citing U.S. BUREAU OF THE CENSUS, DEP'T OF COMMERCE, CURRENT POPULATION REPORTS, SERIES P-20, No. 412, HOUSEHOLDS, FAMILIES, MARITAL STATUS, AND LIVING ARRANGEMENTS: MARCH 1986 Advance Report 2, fig. 2); Kandoian, *supra* note 66, at 1831 n.12.

105. Altruism has been defined as "self-destructive behavior performed for the benefit of others." Edward O. Wilson, *The Genetic Evolution of Altruism*, in ALTRUISM, SYMPATHY, AND HELPING, *supra* note 6, at 11, 11.

for the instinctive responses that are programmed in one's genes to protect the immediate family.¹⁰⁶ The family has come to stand for altruism and the market for self-interest because the dual value system reflects what many people believe to be an accurate description of reality. The caretaker must prove that she expected to be paid for her labor and that the parties entered into a contract, not a relationship, so that her motivation comports with society's perception of human nature.¹⁰⁷

B. Altruism and Modern Society

Altruistic tendencies require a social setting that fosters sympathy for others. In modern society, community feelings are likely to be inhibited by growth management policies that concentrate on housing developments in the suburbs. Suburban growth actually could heighten social divisions by destroying the mix of socioeconomic classes in urban neighborhoods and replacing them with developments composed of narrow, social-demographic groupings. Communities no longer are developed to build a sense of neighborhood, but to provide easy access to an expressway, facilitating travel from home to the workplace.

106. Sociobiology explains altruism as a mechanism of species survival:

An organism that consumed all the food it gathered, instead of feeding some of it to children, might well live a long time, but it would not pass on its selfish tendencies to future generations. . . . Over evolutionary time, what survives is not the organism but the tendency . . . to feed children rather than the tendency to feed only oneself.

Mark Ridley & Richard Dawkins, *The Natural Selection of Altruism*, in ALTRUISM AND HELPING BEHAVIOR: SOCIAL, PERSONALITY, AND DEVELOPMENTAL PERSPECTIVES 19, 22 (J. Phillippe Rushton & Richard M. Sorrentino eds., 1981) [hereinafter ALTRUISM AND HELPING BEHAVIOR]. J. Phillippe Rushton explains sociobiological theories on altruism in the following manner:

Critics might question how behaviors such as running into burning automobiles to rescue strangers from otherwise certain death are explained by such a theory. The answer lies in human history. One and a half million years ago, when human altruism evolved, such dramatic behaviors did in fact propagate the actor's own genes because people lived within a tribe of individuals who all were more or less directly related to one another.

Rushton, *supra* note 6, at 429.

107. See *supra* notes 89-93 and accompanying text.

Work patterns also keep adults from the home. Today, the workplace has become our surrogate neighborhood. There, however, individuals are organized into a myriad of impersonal bureaucracies, making decisions that affect people's lives with very little personal interaction or exchange of information.¹⁰⁸ Relationships have become formalized. Individuals are inclined to see themselves within various social roles, reacting to the social roles of others. Role-playing, however, can lead to stereotyping, breeding prejudice as well as furthering the distance between individuals. Bureaucratization suppresses an individual's emotional capacity to understand another as a whole person and to respond naturally. Other policies, such as those favoring private transportation over public, also limit social connections, leading to hierarchical interactions with others.

The ways in which we think, influenced by and developed through social relationships, also contribute to the ambivalence surrounding altruism. Post-enlightenment theories, and especially the social compact metaphor, represent the individual's sense of living in a socially isolated environment by expressing an ideology of cultural relativity.¹⁰⁹ Substantive values are individualized, stressing free choice. The liberal ethic of free choice necessarily implies a theory of human relationships in which unrelated human beings harbor different and conflicting needs. One's own ends are usually devoid of communal ties. Collective goals are viewed as a

108. See UNGER, *supra* note 3, at 170-74 (detailing with great sensitivity a person's experience of alienation). Unger asks the following question: "[S]ocial relationships themselves establish who one is. But one is different in each of the seemingly unrelated roles one occupies. Which is the real person among these several persons, or, if all of them are masks, where is the true face to be found?" *Id.* at 173; see also Jennifer Nedelsky, *Reconceiving Autonomy: Sources, Thoughts and Possibilities*, 1 YALE J.L. & FEMINISM 7, 8-10 (discussing liberalism's failure to recognize the inherently social nature of human beings); Peller, *supra* note 3, at 1278-89 (analyzing social relationships which appear normal but are marked by one party being privileged over the other: parent and child, man and woman, teacher and student, and manager and worker).

109. See Mary Midgley, *On Not Being Afraid of Natural Sex Differences*, in FEMINIST PERSPECTIVES IN PHILOSOPHY 29, 32 (Morwenna Griffiths & Margaret Whitford eds., 1988) (commenting on the solitary nature of the social contract and its implicit exclusion of women); see also Benhabib, *supra* note 4, at 89 (arguing that identity refers to how one actually uses one's birth, family, linguistic, cultural, and gender identities to make choices). Women who internalize liberalism's commitment to autonomy become subject to its dangers, just like men. They can slide into nihilism. A recent example is the fate of the two heroines in the film, *Thelma and Louise* (M.G.M.-Pathe Communications Co. 1991).

composite of personal aims and are best served by recognizing the unalterably selfish nature of human behavior. A fragmented society has evolved a fragmented phenomenology, assuming an inside atomistic self apart from others in the outside object world. The self is described as fundamentally unitary, existing in a state of isolation bereft of social ties. Connection is assumed to be rational only if it is self-interested, an expression of autonomy. The person is differentiated from others by a wide range of characteristics, including each subject's aspirations, needs, fears, and interests. But what individuates also separates. Interests at times might coincidentally be the same but the personal subjective selves do not interrelate. In liberalism, the human being is self-enclosed. Michael Sandel, in criticizing contemporary liberalism as exemplified by the Rawlsian social compact, states that the self is put "beyond the reach of experience,"¹¹⁰ and identity is conceived as independent and prior to interrelationships.¹¹¹ The self is disabled from subjectively understanding the other.¹¹²

110. MICHAEL SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* 62 (1982).

111. *Id.* at 134.

112. But as Sandel states:

[A] self so thoroughly independent as this rules out any conception of the good (or of the bad) bound up with possession in the constitutive sense. . . . It rules out the possibility of a public life in which, for good or ill, the identity as well as the interests of the participants could be at stake. And it rules out the possibility that common purposes and ends could inspire more or less expansive self-understandings and so define a community in the constitutive sense, a community describing the subject and not just the objects of shared aspirations. More generally, Rawls' account rules out the possibility of what we might call 'intersubjective' or 'intrasubjective' forms of self-understanding, ways of conceiving the subject that do not assume its bounds to be given in advance.

Id. at 62. The self cannot altruistically gratify another's needs if unable to know in concrete terms what the other desires.

[G]iven the separateness of persons and the intractability of the bounds between them, the content of *this* good (that is, the good I wish another) must be largely opaque to me. On Rawls' view, love is blind, not for its intensity but rather for the opacity of the good that is the object of its concern.

Id. at 170-71.

However, Clare Dalton, as a feminist, disputes the opacity of boundaries between the self and other:

My story reveals the world of contract doctrine to be one in which a comparative few mediating devices are constantly deployed to displace and defer the otherwise inevitable revelation that public cannot be separated from private,

Precluded from directly knowing the other's point of view or subjective motivations, there is a tendency to conclude cynically that altruistic intentions do not really exist.¹¹³ In

or form from substance, or objective manifestation from subjective intent. The pain of that revelation, and its value, lies in its message that we can neither know nor control the boundary between self and other.

Dalton, *supra* note 47, at 1113.

Robin West puts it another way:

Both the promise and the problem of law, including the law of contracts, arise from ambivalent feelings of both knowledge and ignorance of the other and fear and love for the other

. . . .
 . . . The reification of rights that the Rule of Law facilitates—championed by the liberal as the law's greatest triumph—at times increases rather than bridges the distance between us. It is not the Rule of Law, but empathy, that can unite the self with stranger

Robin West, *Law, Rights, and Other Totemic Illusions: Legal Liberalism and Freud's Theory of the Rule of Law*, 134 U. PA. L. REV. 817, 862–63 (1986) (footnotes omitted).

113. Ronald Cohen writes:

Since I can never fully get into the mind of another, I can always assume that my giving produces some feelings of satisfaction and well-being, but I can never confidently argue that the desire to give of my efforts, time, or resources is not in terms of real or imagined rewards rather than in terms of some innate helping or altruistic impulse. This means that, in effect, the hedonistic paradox makes a good logical basis for postulating man's essentially hedonistic nature, although it obviously neither proves nor disproves such a postulate or its opposite—namely, that man can act from purely altruistic motives.

Ronald Cohen, *Altruism: Human, Cultural, or What?*, in ALTRUISM, SYMPATHY, AND HELPING, *supra* note 6, at 79, 83; see also Martin L. Hoffman, *The Development of Empathy*, in ALTRUISM AND HELPING BEHAVIOR, *supra* note 106, at 41, 41 (commenting that the inference of a hidden selfish motive fits culturally within Western philosophy's concept of human nature).

Some studies have proven the existence of altruism. See, e.g., Shalom H. Schwartz, *Elicitation of Moral Obligation and Self-Sacrificing Behavior: An Experimental Study of Volunteering to Be a Bone Marrow Donor*, 15 J. OF PERSONALITY AND SOC. PSYCHOL. 283, 289 (1970) (stating that 83% in a population of 144 agreed to blood tests to be used to determine compatibility for bone marrow transplants). Nonetheless, we tend to emphasize and popularize notorious examples of nonaltruistic conduct as proof of its nonexistence. The well-known case of Kitty Genovese, killed by her assailant while 38 neighbors observed the incident and failed to intercede, is one example. Martin Gansberg, *37 Who Saw Murder Didn't Call the Police*, N.Y. TIMES, Mar. 27, 1964, at A1; see also Silver, *supra* note 10, at 423 (discussing notorious examples).

Dr. Schwartz has suggested that the capacity for altruistic behavior is related to an awareness that conduct will have positive consequences for others, cognizance of an ability to control actions, and a sense of personal responsibility for one's behavior. See Schwartz, *supra*, at 283. As the degree of personal involvement and salience of consequences weakens, so does the tendency to intervene.

autonomous isolation, the person is likely to assume, without really being sure, that there is an element of psychic gain in every seemingly altruistic act. Paradoxically, altruism is believed to be, at bottom, selfish behavior, because there is self-satisfaction in self-sacrifice. Finding a bargain exchange in the caretaker cases is intuitively apt if all seemingly donative conduct is motivated by self-profit.¹¹⁴ Those who claim to act for unselfish reasons are viewed with hostility and suspicion because they must be hypocrites unwilling to admit to their secret psychological gains.¹¹⁵

Nonetheless, the inability to know another's mind does not require that we choose between the two extremes in belief: a world in which altruism never exists and one in which all acts of charity and benevolence are disinterested. Rather, we can work together, building a world in which barriers between the self and other are removed and creating a climate in which

114. A classic example of the altruistic paradox is found in *Allegheny College v. National Chautauqua County Bank*, in which Judge Cardozo characterizes a philanthropist's motivation in promising a gift to a college as the self-seeking desire to be remembered after death. 159 N.E. 173, 175 (N.Y. 1927). If psychic gain is present, the difference between donative promises and bargains breaks down. Landes and Posner also refer to the importance of public recognition in charitable donations, stating that anonymous gifts are relatively rare. Landes & Posner, *supra* note 17, at 93. Donors frequently "negotiate, sometimes fiercely, with universities, hospitals, and other charitable institutions over the price of naming the donor on a building or a room." *Id.* at 94.

However, some studies researching various tribal cultures suggest more complicated motivations for donative conduct. Gifting and acts of sacrifice are ways to create a social life and maintain a particular culture's social bonds. See, e.g., Sasha R. Weitman, *Prosocial Behavior and Its Discontents*, in ALTRUISM, SYMPATHY, AND HELPING, *supra* note 6, at 229, 232 (discussing the theories of Lévi-Strauss and Mauss). See generally CLAUDE LÉVI-STRAUSS, *THE ELEMENTARY STRUCTURES OF KINSHIP* (1969); MARCEL MAUSS, *THE GIFT: FORMS AND FUNCTIONS OF EXCHANGE IN ARCHAIC SOCIETIES* (1967).

115. Certainly there are logical reasons to distrust opportunists who preach altruism and appeal to our better nature in the name of brotherhood or sisterhood merely to gain a purely personal political or economic advantage, a form of officiousness. History has taught us that such advocates are dangerous to the common good. See FRIED, *supra* note 46, at 90-91 (arguing that forced altruism becomes tyranny). But the opposite is equally threatening. Persuading others to consider only their self-interest can be a form of victimization, a divide-and-conquer strategy. For example, in the film, *On the Waterfront* (Columbia Pictures Corp. 1954), the longshoremen were unable to rid themselves of the tyranny of corrupt union officials as long as each was concerned with individual job security. Once self-interest was cast aside and the workers joined together, they were able to overthrow the officials. The workers internalized the group's collective interests, a form of altruism discussed by Harrison. See Harrison, *supra* note 6, at 1343. Appeals to act for the good of others or exhortations on behalf of individualism and autonomy are equally capable of being used as a means of exploitation.

altruism can flourish. One way to accomplish this goal is to unmask the persons and the relationship hidden behind a contract in the caretaker cases. By recognizing their connection we can begin to understand that we have created the social divisions we desire to transcend.

The cultural disbelief in altruism also finds support in classical psychoanalysis, in which altruistic conduct is treated as psychoneurotic behavior. For example, in analyzing one of her patients who was a governess—in other words, a caretaker—Anna Freud stated the following:

Although she took no trouble about her own dress, she displayed a lively interest in her friends' clothes. Childless herself, she was devoted to other people's children Instead of exerting herself to achieve any aims of her own, she expended all her energy in sympathizing with the experiences of people she cared for.¹¹⁶

Freud explains this behavior as egotistical despite the outward appearance of altruism:

The vanity of her women friends provided, as it were, a foothold for the projection of her own vanity, while her libidinal wishes and ambitious fantasies were likewise deposited in the outside world. . . . The surrender of her instinctual impulses in favor of other people had thus an egoistic significance, but in her efforts to gratify the impulses of others her behavior could only be called altruistic.¹¹⁷

Freud diagnoses altruism as the secondhand enjoyment of forbidden fruits, vicariously identifying one's prohibited instinctual impulses with another. People project their desires onto the nonself, not out of an understanding of the other's needs, but as a neurotic form of self-gratification. Giving becomes an illness, symptomatic of abnormality.¹¹⁸ The

116. ANNA FREUD, *THE EGO AND THE MECHANISMS OF DEFENSE* 125 (Cecil Baines trans., International Universities Press 1966) (1936).

117. *Id.* at 125–26.

118. Although a large number of volunteers are willing to donate a kidney to unrelated needy recipients, the medical profession routinely rejects strangers as prospective donors, assuming that the motivation is indicative of mental disturbance.

possibility of a healthy projection of one's felt needs and an empathetic identification is minimized.¹¹⁹ Altruists are at best neurotics and at worst hypocritical and manipulative.

The self cannot even trust itself to acknowledge its own desires because the conscious mind deceptively masks egocentric needs. Sigmund Freud stated:

Assuming that unconscious tendencies do exist in mental life, the fact that the opposite tendencies predominate in conscious life goes to prove nothing. Perhaps there is room in the mind for opposite tendencies, for contradictions, existing side by side; indeed, possibly the very predominance of the one tendency conditions the unconscious nature of the opposite.¹²⁰

The more altruistic we seem, the more egoistic we are. Through symbolic dreams and fantasies, unconscious and preconscious desires find expression, and the self is revealed to be relentlessly driven by the libido to seek selfish pleasures, unconstrained by the dictates of society.

Perhaps, then, you will undertake to overlook the offensive nature of the censored dream-wishes and will fall back upon the argument that it is surely very improbable that we ought to concede so large a part in the human constitution to what is evil. But do your own experiences justify you in this statement? I will say nothing of how you may appear in your own eyes, but have you met with so much goodwill in your superiors and rivals, so much chivalry in your enemies and so little envy amongst your acquaintances, that you feel it incumbent on you to protest against the idea of the part played by egoistic baseness in human nature? Do you not know how

Carl H. Fellner & Shalom H. Schwartz, *Altruism in Disrepute*, 284 NEW ENG. J. MED. 582, 582 (1971); see also *supra* note 31 (discussing the view of donative promises as irrational behavior).

119. Anna Freud writes: "It remains an open question whether there is such a thing as a genuinely altruistic relation to one's fellowmen, in which the gratification of one's own instinct plays no part at all, even in some displaced and sublimated form." FREUD, *supra* note 116, at 134 n.4.

120. SIGMUND FREUD, *The Dream-Censorship*, in A GENERAL INTRODUCTION TO PSYCHO-ANALYSIS 122, 129-30 (Joan Riviere trans., Liveright Publishing Corp. 1935) (1920). For a discussion of Sigmund Freud's legal theory and its relationship to liberalism, see generally West, *supra* note 112, *passim*.

uncontrolled and unreliable the average human being is in all that concerns sexual life? Or are you ignorant of the fact that all the excesses and aberrations of which we dream at night are crimes actually committed every day by men who are wide awake? What does psycho-analysis do in this connection but confirm the old saying of Plato that the good are those who content themselves with dreaming of what others, the wicked, actually do?¹²¹

Insofar as the self cannot know itself except through the distorted representation of symbols, self-consciousness constitutes an awareness of self-alienation as well as alienation from others.

In summary, the law prioritizes autonomy and refuses to redefine the family because, as a society, we are unable to articulate a coherent principle of altruistic collective responsibility that rises above self-interest. In a world in which the person is socially distanced from others, the liberalist ethic cannot envision a self subjectively able to understand the other, and the post-Freudian perspective views personality as not experientially needing connection except to further its own ends. Alienated in many ways, we have come to believe in the social divisions that the law tells us cannot be changed.

III. THE CONSEQUENCES OF GENDERIZED CHILD CARE

Social roles within the family, as well as social life in the outside world, influence the characteristics of an individual's personality, the specific values of a culture, and the law. Studies in psychology have long recognized that the sense of self and an individual's frame of reference to others are profoundly influenced by early childhood experiences.¹²² The self is a complex concept, involving the physical and emotional sensations of a biochemical creature and the cognitive awareness of a bounded ego separate and apart from all other objects in the world. Genderized child care—the caretaking of

121. FREUD, *supra* note 120, at 130.

122. In emphasizing the mother/child relationship in my analysis, I do not deny multiple cultural identities or the importance of the various social organizations in which each of us are situated. Nonetheless, primary relationships in the family also are constitutive to identity formation.

virtually all children by females—has the potential to explain why many men and women lead dissimilar lives and develop different modes of moral reasoning. Because women are almost exclusively responsible for child care,¹²³ Nancy Chodorow claims that consciousness of self is the result of a response of the infant to the gender of the caretaker and the caretaker's interaction with the gender of the child.¹²⁴

In Chodorow's view, the primary caretaker perceives a daughter as an extension of self, whereas a son is understood to be an other because he is the sexual opposite.¹²⁵ The male is both externally encouraged by the caretaker to see himself as different from the mother and internally compelled to abandon his connection to her because of oedipal fears of paternal anger and punishment. In addition, the newly emerging masculine identification is threatened by mother dependency. The male child's attachment to the primary caretaker terminates too quickly and the severance is sharp and incisive. The creation of the self is traumatic because ego boundaries are a necessary defense against incestuous sexuality.¹²⁶ On the other hand, the female child has no need to relinquish the sense of oneness and continuity with the same gender caretaker. She remains attached to the primary caretaker for a longer period of time and moves into the oedipal phase at a more leisurely pace. She is able to internalize the caretaker connection into a sense of self,

123. Even if the biological mother is unable to perform the role of primary caretaker, women traditionally raise children in the home or in day-care settings. CHODOROW, *THE REPRODUCTION OF MOTHERING*, *supra* note 7, at 216.

124. *Id.* at 77–110. Chodorow has revised her original thesis to some extent and no longer claims gender identity is solely determined by mothering. See CHODOROW, *FEMINISM AND PSYCHOANALYTIC THEORY*, *supra* note 7, at 6. Not all feminists agree with Chodorow. See, e.g., JESSICA BENJAMIN, *THE BONDS OF LOVE: PSYCHOANALYSIS, FEMINISM, AND THE PROBLEM OF DOMINATION* 90–92 (1988) (arguing that reclaiming the importance of the mother as nurturer in identity formation has led to idealizing a woman's desexualization, lack of agency, and passivity, as well as preserving a separate, unchallenged male domain of freedom and sexual desire); JANE FLAX, *THINKING FRAGMENTS: PSYCHOANALYSIS, FEMINISM AND POSTMODERNISM IN THE CONTEMPORARY WEST* 165–67 (1990) (arguing that Chodorow's analysis fails sufficiently to take into account racial and class-based differences or to explain why women have been given responsibility for child rearing). The various feminist psychoanalytic theories are reviewed by Grosskurth, *The New Psychology of Women*, XXXVIII THE N.Y. REV. OF BOOKS 25 (1991).

125. CHODOROW, *THE REPRODUCTION OF MOTHERING*, *supra* note 7, at 100, 105. I use the terms "son," "daughter," and "mother" broadly, not limiting them to biological mother-and-child relationships.

126. *Id.* at 134–35, 166–67.

gradually developing a self that is more joined to others and the world.¹²⁷ The female does not resolve the oedipus complex. The mother lives inside the daughter.¹²⁸

Accordingly, Chodorow's theory posits a difference in male and female ego sense. The male, who is forced to resolve oedipal desires, defines himself by his separation from the primary caretaker, whereas the female forms a self in connection to her. The male self is a defensive solid with well-marked ego boundaries. The female self is liquid. As a fluid, it takes on various shapes and is imbued with the colors of relationships, continuously flowing and overlapping into others. Empathy permeates the ego and relationships are a natural part of the self. Men, however, experience ambivalent feelings of fear and desire over attachment. Because the male must cope with premature separation from the primary caretaker, he both yearns for caring and denies his longing, repressing the infantile associations that his emotional needs entail.¹²⁹

Women's mothering affects adult relationships as well. Both sexes reenact their original relationship with the primary caretaker in adult personal relationships, reproducing the roles of mother and child.¹³⁰ Women, including those with paying jobs, are more likely to be the nurturers and the comforters, raising children and working in the home. Men are more inclined to be the recipients of caring and to be the providers and protectors, placing career goals in the forefront. Furthermore, as a result of the caretaker connection, some women do not experience the alienation and disconnection from others that is inherent in living in the fragmented public social world. The lives of a significant number of women often are either partially or fully devoted to care (of children, of spouse, and/or of elderly parents).¹³¹ They are involved in

127. *Id.* at 110, 135-40. Separation from the primary caretaker can take on neurotic characteristics in women as well as in men. Women tend to have difficulty in achieving individuation and independence. They can remain neurotically attached to the primary caretaker as adults. *Id.* at 135, 140.

128. *Id.* at 168.

129. *Id.* at 169.

130. *Id.* at 194-95; see also DOROTHY DINNERSTEIN, *THE MERMAID AND THE MINOTAUR* 61 (1976) (discussing the attempt to recover the loss of the mother in adult relationships).

131. CHODOROW, *THE REPRODUCTION OF MOTHERING*, *supra* note 7, at 214-15. Susan Okin reports that two-fifths of married women are full-time housewives. See OKIN, *supra* note 8, at 150; see also PHILLIP BLUMSTEIN & PEPPER SCHWARTZ, *AMERICAN COUPLES* 312 (1983) (stating that culturally, "growing up female makes

an affective network of family and friends. Although a part of the workplace, because they must balance its needs with other obligations, they often set their own career goals with others in mind.¹³² Many women bring a caring ethic to the workplace. Responsibility and commitment to various relationships structure their value system.¹³³ In addition, some women learn to associate men with financial security and come to expect they will be dependent on a relationship to survive.¹³⁴

housework something women do"). Half of all mothers with young children work and 85% of working women can expect to bear at least one child while in the workforce. Finley, *supra* note 95, at 1125. Cynthia Epstein estimates that close to 70% of women between ages 25 and 54 were in the labor force by 1984, including 20 million mothers. CYNTHIA EPSTEIN, *DECEPTIVE DISTINCTIONS: SEX, GENDER, AND THE SOCIAL ORDER* 202 (1988). Despite changes in the workforce, the traditional division of labor in the home has not altered. *Id.* at 213. Moreover, as our aging population increases, women have assumed the burden of caring for elderly relatives. *Id.* at 212. Ninety-five percent of the elderly live near or with their children; only five percent are placed in institutions. *Id.* Much of the work women do in the home has not been documented precisely because it is not perceived as labor. Scholars have only recently focused on the nurturant role and the amount of time spent on family activities. *Id.* at 200. Thus, women must make contingent career choices in light of their families' needs.

132. See MARY F. BELENKY ET AL., *WOMEN'S WAYS OF KNOWING* 149–52 (1986).

133. *Id.* at 149–50.

134. See, e.g., SHULAMITH FIRESTONE, *THE DIALECTIC OF SEX* 156 (1970) (claiming that healthy love is not possible as long as women are economically dependent on men). One psychological study indicated that women tend to be more pragmatic and "storgic" (love is friendship) than men in their attitudes toward love and close personal relationships, taking into account a man's wealth and social position. Men are inclined to be more erotic and "ludic" (love is a game). Clyde Hendrick et al., *Do Men and Women Love Differently?*, 1 J. SOC. & PERS. RELATIONSHIPS 177, 180–84 (1984); see also Ted L. Huston & Richard D. Ashmore, *Women and Men in Personal Relationships*, in *THE SOCIAL PSYCHOLOGY OF FEMALE-MALE RELATIONS* 167, 190–91 (Richard D. Ashmore & Frances K. Del Boca eds., 1986) (discussing the possible reasons behind gender-based attitudes toward love). These studies do not necessarily contradict the ethic of care as much as they suggest its origins. Although survival needs and dependency often dictate women's preferences, within a state of dependency women have attempted to carve out their own ethical stance. One thoughtful study, based on in-depth interviews with many women that allowed them to speak in their own words, suggests women think primarily in relational terms, placing others' needs before their own because of their identification with the mother's role in the family. As a result, women tend to be less transactionally oriented than men in relationships. BELENKY ET AL., *supra* note 132, at 178. In comparing the difference in reasoning between men and women, the authors state: "[T]he individual who conceptualizes the self as basically connected to others sees the bonds that knit human relationships together as bonds of attachment. . . . In contrast, the self premised in autonomy sees individuals relating through bonds of agreements, such as contracts, laws, and the like." *Id.*

Women's creative writings are wonderful examples of their capacity to create a moral life in the midst of their gender-bound situation. Fran Olsen refers to the work of Jane Austen, who attempted to give voice to a woman's morality within the confines of a society in which women were totally dependent on marriage for their

Seeing themselves as caretakers, they do not develop an interest in mutual business concerns, preferring to place a high priority on relational needs. They often consider thinking of one's own goals to be a selfish response.¹³⁵ They are unlikely to negotiate a return when emotionally involved because their motivation flows from the relationship itself, not from the desires of a separate unitary self.

Conversely, a great many men self-actualize away from the home through their public social roles. Because individuation requires rejection of the mother and identity is tied to the father-outside world, some males tend to devalue the emotional, more contextualized concerns that define women's lives.¹³⁶

Thus, it is possible that liberalism's commitment to the separation thesis and the law's refusal to recognize altruism reflect a predominantly male phenomenology. In the caretaker cases, there could be two moral orientations and perceptions of the problem to be solved.¹³⁷ A court's frame of reference is the more typically male justice model or the priority of

social position and survival. See Olsen, *supra* note 8, at 1523 n.106. The values of Elizabeth Bennett in *Pride and Prejudice* center on caring and responsibility to others. Her initial refusal to marry Mr. Darcy is based partly on the fact that he secretly aided in ending the developing relationship between her sister and his best friend. JANE AUSTEN, *PRIDE AND PREJUDICE* 170 (Frank W. Bradbrook ed., Oxford Univ. Press 1970) (1813). Her own needs are secondary to the needs of her family. Louisa May Alcott's *Little Women* contains a rich subtext. Although women's values are a morally superior vision to men's, in a patriarchal society women are condemned to the domestic sphere and are unable to become fully realized human beings. Ann Murphy writes:

Marmee loves and socializes, nurtures and stifles her daughters, offering them a vision of perfect love and oneness that heterosexuality cannot hope to duplicate, and an alternate model of identity through community, domesticity, and altruism that their culture can only tolerate by subsuming it in the archetype of female goodness that kills Beth.

Ann B. Murphy, *The Borders of Ethical, Erotic, and Artistic Possibilities in Little Women*, 15 *SIGNS* 562, 575 (1990).

135. See BELENKY ET AL., *supra* note 132, at 77.

136. CHODOROW, *THE REPRODUCTION OF MOTHERING*, *supra* note 7, at 181-82 ("The secure possession of certain realms, and the insistence that these realms are superior to the maternal world of youth, become crucial both to the definition of masculinity and to a particular boy's own masculine gender identification.").

137. The two different voices of morality are explained in *MAKING CONNECTIONS*, *supra* note 4, at 41-47; see also Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Woman's Lawyering Process*, 1 *BERKELEY WOMEN'S L.J.* 39, 50-55 (1985) (theorizing that a woman's lawyering would emphasize mediation and alternate dispute resolution instead of a winner-take-all, adversarial model).

principle. This model defines the moral problem as a disputed claim of a contract between two separate individualists with equal rights.¹³⁸ Courts emphasize what the parties have in common, treating the caretaker in the same way that they would the recipient if he were in her position. Entitlements are measured according to abstract principles of reciprocity, not responsiveness to a particular person's specific needs. This resolution of the moral dilemma is justified by its adherence to an "objective" code of conduct, or norms of behavior that most individuals would regard as fair. If the caretaker can prove a contract, a court will require the recipient to meet his obligations and perform his duties. The law's result leaves the parties in positions of equal independence.

However, considering that the context of many of the caretaker cases is an intimate relationship, the second model more likely reflects the caretaker's perspective.¹³⁹ A caretaker focuses on the person, not principles, and defines the moral issue as a problem with the relationship. She does not see the parties as equals, but as co-dependents who are emotionally attached. To the caretaker, the right decision is the compassionate one. If connection between the parties cannot be restored, she believes that the pain she feels over the loss of the relationship ought to be mitigated.¹⁴⁰

138. For example, the *Steffes* court framed the issue as follows: "[W]here services are performed . . . with expectation of reasonable compensation, recovery may be allowed on the basis of a contract to pay, implied in fact or law." *In re Estate of Steffes*, 290 N.W.2d 697, 701 (Wis. 1980). Ironically, the presiding justice in this case was a woman. While I believe that she was more sympathetic to the caretaker's plight for that reason, she nonetheless expressed herself in terms of the traditional discourse.

139. Although there is a tendency to speak of the second model as the feminine voice, and Chodorow's theory suggests women are more prone to view the world in this way, the cases discussed in this Article demonstrate men as well as women can be motivated by a caretaking ethic. The argument that a woman's morality differs at times from a male's is most compelling when the parties have assumed traditional social roles, living together as de facto husband and wife, with the woman as the caretaker/dependent party. This situation comprises the bulk of the caretaker cases.

140. In some of the cases, women attempt to justify their claim for compensation as damages for what they have suffered for relational loss before turning to a *Marvin* claim. See, e.g., *Carnes v. Sheldon*, 311 N.W.2d 747, 752 (Mich. Ct. App. 1981) (describing a plaintiff who charged fraud because the "defendant promised to marry her but refused to do so"); *Watts v. Watts*, 405 N.W.2d 303, 307 (Wis. 1987) (describing the plaintiff's allegations that the defendant indicated both orally and through his conduct that he considered her to be his wife and that she would share equally in his increased wealth).

Compelled to abide by the justice model, the caretaker is unable to explain why she really feels she has been harmed, that she believes the parties are mutually responsible for each other's welfare. What the caretaker values the most, the caring bestowed on the other person, is not a part of the evaluation of her conduct. The law identifies her as performing a contractual obligation and denies her moral identity as a caring self, submerged in a relationship.

Genderized child care offers a profound psychological explanation for why the law adheres so strongly to the contractual model. The intimate nature of the relationship between the caretaker and the recipient may represent a reenactment of the mother/child attachment, causing the lawmaker¹⁴¹ to identify with the recipient and to see the caretaker as a powerful mother-figure. The very intensity of the initial attachment to the mother and her importance to survival and emotional growth may leave many men with a legacy of hostility toward women and a fear of maternal power. To many men, separation is life-giving in that masculine self-definition comes from rejecting the maternal bond.¹⁴² In these cases, all the resultant apprehension and

141. Lawmakers are seldom women. For example, in Florida, only 10% of state court judges are women. *Report of the Florida Supreme Court Gender Bias Study Commission*, 42 FLA. L. REV. 803, 928 (1990) [hereinafter *Bias Study*]. Some judicial positions are elected; women attorneys find it particularly difficult to raise the necessary funds and to accumulate the obligatory political influence required to succeed in an election contest. *Id.* Some Florida judges are appointed by Judicial Nominating Commissions. These commissions are disproportionately represented by men. *Id.* at 929. Recent studies indicate that these commissions discount many female candidates for judgeships because they practice in the area of family law, which is not considered as prestigious or as sophisticated as a commercial law practice and is perceived as a "female" profession. *Id.* at 930. Ironically, family law issues constitute 40% of all civil filings in Florida, second only to criminal cases. *Id.* at 811.

Nationally, women are also underrepresented in law school faculties and in law firms. *Id.* at 917; see also Robert J. Borthwick & Jordan R. Schau, Note, *Gatekeepers of the Profession: An Empirical Profile of the Nation's Law Professors*, 25 U. MICH. J.L. REF. 191, 199 (1991) (reporting that slightly more than 20% of the nation's law professors are women). Even when present in these areas, they do not occupy important, policy-making positions. Few women are tenured, achieve partnership, or wield the political influence to implement change in bureaucratic decision making. *Bias Study*, *supra*, at 917; Borthwick & Schau, *supra*, at 199-212.

As of 1990, there were 27 women serving in the United States House of Representatives and exactly two women in the Senate. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACTS OF THE UNITED STATES: 1991, at 263, 395 (111th ed. 1991). Even if women are able to achieve positions of authority and thus are able to make policy, I believe they are likely to be women who have assimilated male perspectives.

142. Chodorow writes:

For children of both genders, mothers represent regression and lack of autonomy. A boy associates these issues with his gender identification as well.

emotional baggage that interdependence represents is brought to the surface. The legal discourse, seemingly rational and objective, actually could be the troubled response of the mature male, who always is engaged to some extent in the young male's primal struggle to gain independence from the primary caretaker and to accept his renunciation of mother-love. If the caring and the connection between the parties are recognized, the recipient's emotional dependence on the mother—and her power over the helpless male child—is acknowledged as well. Seeking to suppress such oedipal issues from the analysis, the lawmaker reframes the personal relationship as a bargain between two adult autonomous males. In this way, the discourse manages to preserve the male's individuality and self-reliance, but at the expense of stifling the female's self-expression, caring, and experience of connectedness.

Dependence on his mother, attachment to her, and identification with her represent that which is not masculine; a boy must reject dependence and deny attachment and identification. . . . A boy represses those qualities he takes to be feminine inside himself, and rejects and devalues women and whatever he considers to be feminine in the social world.

CHODOROW, *THE REPRODUCTION OF MOTHERING*, *supra* note 7, at 181. Isaac Balbus contends:

The demands of "masculine" in contrast to "feminine" development thus dictate that the imperatives of individuation, of defining oneself in opposition to the mother, will be reinforced dramatically by the need of the male child to suppress the "female" within him. This means that the separation of the male child from his mother is likely to be both more extreme and more painful than that which the female child experiences. Consequently his fear and loathing of the mother will be more intense as well.

ISAAC D. BALBUS, *MARXISM AND DOMINATION: A NEO-HEGELIAN, FEMINIST, PSYCHOANALYTIC THEORY OF SEXUAL, POLITICAL, AND TECHNOLOGICAL LIBERATION* 308 (1982). Balbus argues the very power of the mother over the infant plants the seeds of domination and leads to excluding woman from the public sphere:

The woman represents for him the dreaded specter of the power of the mother, a power from which he has spent the better part of his emotional life trying to escape; the power of the woman must therefore be constrained—she must be kept in her place—lest she reestablish the maternal tyranny that the man experienced as an infant.

Id. at 310; *see also* DINNERSTEIN, *supra* note 130, at 164–75 (describing the power of the child's attachment to its mother and arguing that both sexes continue throughout their lives to assert themselves against their mother). The mother must at times frustrate as well as satisfy the infant's desires. She holds "life-and-death control over helpless infancy." *Id.* at 164 (emphasis omitted).

What is discussed least in the cases—sexual relations between caretaker-mother and recipient-son—could cause the discourse to become overtly hostile.¹⁴³ A judge denies compensation outright, or suppresses inappropriate, childish longings associating sexuality with dependency, leaving only a socially acceptable exchange of commodities.¹⁴⁴ Recognizing the caring in any of these cases is akin to exposing a neurotic dependency on mother.¹⁴⁵ In emotionally identifying with the male recipient, courts also identify with the male's strong financial interest in not treating the relationship as a marriage. At best, the parties entered a contract with limited responsibilities for each other.

143. Some courts, perhaps caught up in gender stereotyping, seem angry at the women in the cases. They see the women as sexually calculating, taking advantage of male innocence. For example, in *Hewitt v. Hewitt*, the court wrote:

[I]t would seem more candid to acknowledge the return of varying forms of common law marriage than to continue displaying the naivete we believe involved in the assertion that there are involved in these relationships contracts separate and independent from the sexual activity, and the assumption that those contracts would have been entered into or would continue without that activity.

394 N.E.2d 1204, 1209 (Ill. 1979). And in *Donovan v. Scuderi*, Judge Wilner concurred with the court's decision to enforce the woman's claim, but stated: "It is naive at best to assume that she would have expended \$60,000 to buy him clothing, meals, artwork, etc., if he had never entered into the 'loving' relationship with her, or had withdrawn from it." 443 A.2d 121, 128 (Md. Ct. Spec. App. 1982) (Wilner, J., concurring).

144. See, e.g., *Schwegmann v. Schwegmann*, 441 So. 2d 316, 324–25 (La. Ct. App. 1983) (stating that a "concubine" is not allowed to recover in quantum meruit for her domestic work, but may press a claim for business services), *cert. denied*, 467 U.S. 1206 (1984).

145. By denying recovery, the discourse encourages attempts to stave off adult responsibility—the law infantilizes the male. *Marvin v. Marvin* pointed out that denying recovery promotes the disinclination to marry. The male cohabitant has a financial incentive to not marry the woman if he knows she is not entitled to any claim of compensation when the relationship ends. 557 P.2d 106, 122 (Cal. 1976).

At the same time, the male experiences a great need for caring and commitment, which also carries infantile associations resulting from genderized child care:

Much male fear of feminism is the fear that, in becoming whole human beings, women will cease to mother men, to provide the breast, the lullaby, the continuous attention associated by the infant with the mother. Much male fear of feminism is infantilism—the longing to remain the mother's son, to possess a woman who exists purely for him.

ADRIENNE RICH, *Husband-Right and Father-Right*, in *ON LIES, SECRETS, AND SILENCE* 215, 221 (1979).

Although marriage involves similar psychological dynamics, when a marriage ends a court need not define and scrutinize the various emotional factors constituting the marital relationship. The relationship is legally cognizable because the parties participated in the formalism of a marriage ceremony.¹⁴⁶ At the time of divorce, the law focuses on property, economic support, and custody.¹⁴⁷ But if the relationship is not legally cognizable, more personal aspects of the relationship need to be brought out in court to establish status.¹⁴⁸ To avoid a psychologically troubling area, the court imposes an entirely new and totally impersonal relationship on the parties. The need for caring, the reason for the relationship and the real benefit received from the caretaker, remains hidden and uncompensated.

In the same way that lawmakers may find it problematic to acknowledge the male recipient's emotional dependence, they also experience psychological difficulty in recognizing the woman's altruistic caring. To minimize maternal power and mask infantile needs, they characterize the woman as an autonomous male. Now the law is able to identify with "him" as well as with the recipient. Caring, a direct and explicit expression of connection, poses a danger to the adult "male"

146. For an explanation of the various functions served by legal formalities see Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 800-04 (1941). Legally required marriage formalities are minimal. Although every state requires a marriage license and records marriage certificates, no particular form of ceremony is needed. See Glendon, *supra* note 101, at 681.

147. See HOMER H. CLARK, JR., 2 THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 14.4, at 32 (2d ed. 1988) (noting that the function of a divorce trial is to settle custody, property, and maintenance issues and that the termination of the marriage is no longer a triable issue).

148. This occurs in a claim of common-law marriage. Recognition requires proof of an agreement to be married and that the parties hold themselves out to the community as married, cohabitating together for a length of time. See 1 *id.* § 2.4, at 104-05. Courts focus on the duration and character of the relationship, and frequently infer an agreement in light of the circumstances, that is, in light of the fact that the parties are living together as if they are married. *Id.* at 107-08. There is a significant difference between the legal treatment of a marital contract and a contract to provide services, even though the contextual circumstances might be identical. Common-law marriage is recognized in 14 jurisdictions. See ALA. CODE § 30-1-9 (1989); GA. CODE ANN. § 19-3-1 (Michie 1991); IDAHO CODE § 32-301 (Michie 1983); IOWA CODE § 595.11 (1983); KAN. STAT. ANN. § 23-101 (1990); MONT. CODE ANN. § 40-1-403 (1985); OHIO REV. CODE ANN. § 3105.12 (Baldwin 1991); OKLA. STAT. ANN. tit. 43, § 1 (West 1991); PA. STAT. ANN. tit. 48, § 1-23 (1965); TEX. FAM. CODE ANN. § 1.91 (West 1975); *Matthews v. Britton*, 303 F.2d 408, 409 (D.C. Cir. 1962); *Deter v. Deter*, 484 P.2d 805, 806 (Colo. Ct. App. 1971); *Souza v. O'Hara*, 395 A.2d 1060, 1062 (R.I. 1978); *Weathers v. Bolt*, 361 S.E.2d 773, 773 (S.C. Ct. App. 1987).

caretaker, as well as to the recipient, as a regression and as a loss of self. Connection dissolves the solid boundary between the self and other and virtually eliminates the unitary self.¹⁴⁹ The altruist caretaker signifies a selfless self. Fear of psychic annihilation¹⁵⁰ causes the law to deny the caretaker's altruism and to reconstruct her motives as self-interested. Although the law overtly emphasizes the threat to the recipient's autonomy if compensation is compelled without consent to be bound, the peril to the autonomy of the reconstructed male caretaker is just as great. A bargain guards the boundaries of two egos.

Redefining the relationship as one of commerce instead of caring has a disparate impact on women (the majority of caretakers) because adult males do not value their market services—essentially housework.¹⁵¹ The caretaker never

149. There is an interesting metaphor at work here. The self is described as a physical container in which the ego is deposited. Giving depletes the container's contents. Altruistic behavior leads to loss if there is a physical limit to the self as a boundaried object. If a different metaphor is used, a self that is not a container, but propertied more like liquid, taking on shapes according to relationship, the destructive element is not present. For more on metaphor, and an argument that we reason using metaphors based on early childhood cognitive experiences of our body's physical properties and limits, see Steven L. Winter, *Transcendental Nonsense, Metaphoric Reasoning and the Cognitive Stakes for Law*, 137 U. PA. L. REV. 1107, 1130-34, 1147-48, 1150-51 (1989). Perhaps the container metaphor is also a result of a male's early childhood development. A woman's metaphor would differ because the growth of self-awareness is experienced as connection with the mother, instead of as separation from her.

150. Robin West has consummately expressed a possible difference between men's and women's fears:

The human being, according to legal theory, values autonomy and fears annihilation, while at the same time he subjectively dreads the alienation that his love of autonomy inevitably entails. Women, according to feminist theory, value intimacy and fear separation, while at the same time longing for the individuation which our fear of separation precludes, and dreading the invasion which our love of intimacy entails.

West, *supra* note 4, at 42.

151. In some cohabitation cases and in claims for compensation after providing services to relatives, the labor must appear to be more than just ordinary housework in order for the caretaker to obtain recovery. Round-the-clock nursing or commercial services are often required. See *supra* note 65; see also *Roznowski v. Bozyk*, 251 N.W.2d 606, 608 (Mich. Ct. App. 1977) (holding that because the services were rendered in a tavern and in connection with business, there is a claim for quantum meruit recovery even though the parties were living together); *Suggs v. Norris*, 364 S.E.2d 159, 162-63 (N.C. Ct. App. 1988) (allowing a claim for the reasonable value of the services to a caretaker who worked on the decedent's farm, harvested the produce, drove to markets over a sixty-mile route, and took care of the decedent who was an alcoholic), *cert. denied*, 370 S.E.2d 236 (N.C. 1988).

really wins. She is either Erda, the earth mother, whose domestic services should be given freely to her children, or Eve, the seductress, luring adults into making generous promises of compensation that the law must modify or break.¹⁵² Her reliance on the recipient seems misplaced because the emotional and interdependent aspects of the relationship are not openly discussed. Even worse, the woman's claim for compensation comes from a deeply felt loss of self that is not recognized or understood in the discourse. When a relationship ends, the separation diminishes her in a way that she is unable to explain as material loss. Denying compensation or compensating her only for the services she has performed leaves her feeling incomplete, because the whole person that was part and parcel of the relationship is not validated.

One possible consequence of our society's choice to relegate child care to women is that the male creates a system of law and a theory of relationships that refuses to acknowledge intimate attachments. We have created neurotic law.¹⁵³ As long as women are the primary caretakers of children, their sons will limit altruism to the traditional family, perpetuating a divided social world.

IV. REDEFINING THE FAMILY: COMPENSATING CARETAKERS FOR RELATIONAL LOSS AND ENCOURAGING CO-PARENTING

The law's refusal to recognize relational needs has contributed to our concealing their importance to ourselves. To cure the neurotic stance of existing law, we should reward selfless caring on its own terms as an act of altruism, acknowledge the caretaker's loss, and insist that the need for family connection be ratified as a part of the human condition. The caretaker

152. See DINNERSTEIN, *supra* note 130, at 147-54. Dinnerstein insists that as long as women are primary caretakers, men will view them as the "dirty goddess." *Id.* at 147-49.

153. Male values, the justice model, are just as subjective and as much the product of social interactions, in particular genderized child care, as women's moral orientation. Regardless of the debate over values, whether intrinsic to gender or a reflection of a culture's social divisions, the male approach has been given the voice of authority at the expense of women as if it were an objective truth.

should be compensated without resorting to the fiction that she acted with an expectation to be paid, and her reliance on the recipient should be validated. By denying the altruistic elements inherent in the relationship, we encourage fraud and perjury, as well as contempt for the justice system. A more open and sincere discourse, centered in the felt experiences of those involved, in which the caretaker can present the facts unfiltered by an abstract standard of intent to be paid, brings the law closer to the social reality of the parties and a true standard of justice.¹⁵⁴

A. *Compensating Relational Loss*

Various solutions are possible. We could, in a forthright manner, resurrect common-law marriage.¹⁵⁵ Several commentators have suggested more sophisticated versions of common-law marriage to alleviate some of the problems associated with a quasi-legal status. William Reppy is in favor of creating the status of "lawful cohabitation" so that parties are entitled to take advantage of income, gift, and estate tax benefits.¹⁵⁶

Ellen Kandoian turns to partnership law and sensitively redefines marriage to include homosexual and lesbian relationships. Building on a business partnership model, she defines

154. The very language of law can distance us from each other and hinder understanding:

[C]ourts should allow all facts to be presented by the parties; they should encourage the speech of the "legally inarticulate" and include it within the universe of social realities that the law comprehends. . . . When law and the real world meet, we can demand that the world reformulate itself in the language of law—or we can transform the law by opening it to the language of the world.

Coombs, *supra* note 27, at 1657–58 (footnote omitted).

155. See *supra* note 148 for a list of jurisdictions which recognize common-law marriage; see also Blumberg, *supra* note 101, at 1171–78 (surveying legislation granting legal recognition to cohabitants in Cuba, Israel, Ontario, Sweden, and the United Kingdom); deFuria, *supra* note 69, at 219–20 (discussing the legal status of nonmarital and meretricious relationships in France, Venezuela, Bolivia, Panama, Sweden, Cuba, and Puerto Rico).

156. William A. Reppy, Jr., *Property and Support Rights of Unmarried Cohabitants: A Proposal for Creating a New Legal Status*, 44 LA. L. REV. 1677, 1716–22 (1984).

marriage as an "association of two persons to carry on a shared life."¹⁵⁷ A presumption of a shared life arises from long-term cohabitation.¹⁵⁸ After two years, sufficient time has passed for at least one of the parties to feel married, and it is fair to say the relationship is more than a casual friendship.¹⁵⁹ The doctrines of "unjust enrichment, undue influence, and abuse of a confidential relationship can be made to protect economically vulnerable partners."¹⁶⁰

Grace Blumberg proposes two different standards. If the relationship terminates because of death, any "stable cohabitation of any duration" should be treated as a lawful marriage in order for the surviving "spouse" to be included in intestacy and elective share statutes.¹⁶¹ For purposes of maintenance and property division, the parties should be treated as lawfully married if they have lived together for two or more years or if there is a child.¹⁶² Cohabitants need formal recognition to afford them protection and rights against third parties and the state.¹⁶³

157. Kandoian, *supra* note 66, at 1870; see also H. Jay Folberg & William P. Buren, *Domestic Partnership: A Proposal for Dividing the Property of Unmarried Families*, 12 WILLAMETTE L.J. 453, 480 (1976) (suggesting that unmarried couples should be referred to as "domestic partners" and that there is a sufficient relationship to divide the parties' property when there has been "an actual and ostensible family relationship and a union that has been in existence for a substantial period of time").

158. Kandoian, *supra* note 66, at 1870.

159. *Id.* at 1863.

160. *Id.* at 1872; see also RESTATEMENT (SECOND) OF CONTRACTS § 177 (1981) (stating that the contract is voidable by the victim if assent is induced by undue influence); RESTATEMENT (SECOND) OF TRUSTS § 2 cmt. b (1957) (defining a confidential relationship).

161. Blumberg, *supra* note 101, at 1166-67. Even if they are named as beneficiaries in a will, cohabitants are often denied property because the relationship is considered highly suggestive of undue influence. See deFuria, *supra* note 69, at 201 n.7.

162. Blumberg, *supra* note 101, at 1166.

163. Finding housing can be difficult for cohabitants. See, e.g., *Donahue v. Fair Employment and Hous. Comm'n*, 2 Cal. Rptr. 2d 32, 46 (Ct. App. 1991) (holding that although denying housing to cohabitants is discrimination, ending such discrimination is not a compelling state interest and is outweighed by a landlord's right to the free exercise of religion), *review granted*, 825 P.2d 766 (Cal. 1992); *State by Cooper v. French*, 460 N.W.2d 2, 9 (Minn. 1990) (holding that a landlord may refuse to rent to cohabitants because of his religious beliefs). Employment also can be a problem. See, e.g., *State by McClure v. Sports & Health Club, Inc.*, 370 N.W.2d 844, 872 (Minn. 1985) (finding that it is not discriminatory to refuse employment to an unmarried cohabitant because an employer is not required to employ persons whose conduct constitutes criminal behavior under a state fornication statute), *appeal dismissed*, 478 U.S. 1015 (1986). Social security benefits may be denied. See, e.g., *Lynch v. Bowen*, 681 F. Supp. 506, 512 (N.D. Ill. 1988) (holding that, in a jurisdiction that does not recognize common-law marriage, a woman who lived with a man for thirty-eight

In the bigger picture, however, common-law marriage does not address the concerns of caretakers who were not sexually involved with the recipient, but who nevertheless formed a family relationship. We need to do more than reclassify marriage. More broadly, we should redefine family to include all full-time caretakers. Family membership should embrace the Beatrice Monsteds¹⁶⁴ and Mary Lou Brookses¹⁶⁵ of this world, the many surrogate mothers, daughters, and others who provide affection and nurturance to the elderly and the forgotten. Their caring has value above market services and is an accurate measure of the true degree of family attachment. As family members, they should be granted intestate succession rights and allowed an elective statutory share in the deceased's estate.

Living in the same household is not important if the family unit is stable and the caretaker has been responsible for the recipient over time. The relationship between caretaker and recipient can be more permanent than some of the temporary living arrangements considered a family for regulatory

years is ineligible for a widow's social security benefits). Workers' compensation claims and unemployment compensation can also be refused. *See, e.g., Insurance Co. of N. Am. v. Jewel*, 164 S.E.2d 846, 847 (Ga. Ct. App. 1968) (denying workers' compensation benefits); *Cottrell v. EBI Cos.*, 743 P.2d 716, 719 (Or. 1987) (denying a cohabitant the death benefits of workers' compensation because her companion had moved out a month prior to his death with the intention of terminating the relationship). *But see, e.g., MacGregor v. Unemployment Ins. Appeals Bd.*, 689 P.2d 453, 454 (Cal. 1984) (en banc) (holding that a woman had good cause to quit her job in order to follow her cohabitant to another state and preserve the family unit, and was thereby entitled to unemployment compensation if she met other eligibility requirements). Only a few courts have allowed a cohabitant to press a claim for loss of consortium. *See, e.g., Bulloch v. United States*, 487 F. Supp. 1078, 1087 (D.N.J. 1980) (holding that under New Jersey law, a cohabitant has standing to bring a claim for loss of consortium). Bystander recovery for negligent infliction of emotional distress has been rejected. *See, e.g., Elden v. Sheldon*, 758 P.2d 582, 588 (Cal. 1989) (limiting bystander recovery of damages for negligent infliction of emotional distress and loss of consortium to married cohabitants). Wrongful death claims are denied. *See, e.g., Garcia v. Douglas Aircraft Co.*, 184 Cal. Rptr. 390, 392 (Ct. App. 1982) (holding that a meretricious spouse is not recognized as an "heir" in the wrongful death statutory scheme).

Some benefits, however, cannot be eliminated. The children of mothers who receive Aid to Families with Dependent Children and who are living with men who are not legally obligated to support the children cannot be denied payments. *King v. Smith*, 392 U.S. 309, 329-33 (1968).

164. *See supra* notes 59-63 and accompanying text (discussing *In re Hatten's Estate*).

165. *See supra* notes 67-73 and accompanying text (discussing *In re Estate of Steffes*).

purposes.¹⁶⁶ If the parties are emotionally interdependent, and the caretaker has been responsible for ordinary daily needs such as shopping, housework, meals, and medical appointments for two years or more, there is a family. There need not be an exact standard to measure attachment or to gauge the depth and closeness of a relationship. The definition of the family varies depending on the particular facts and the specific needs of the individuals who are involved. Altruistic caring in a stable relationship best defines the meaning of family.

The family takes on special significance if the caretaker has been living with the recipient in a *de facto* marriage. There is usually more emotional and economic interdependence than in other kinds of family relationships. After two years of cohabitation or the birth of a child, cohabitants should be presumed legally married.¹⁶⁷ A recipient at this point in

166. The Supreme Court has defined family to include more than the nuclear-family unit, including grandparents, uncles, aunts, and cousins who share the same household. *Moore v. City of E. Cleveland*, 431 U.S. 494, 504 (1977). In *United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 531-32 (1973), for purposes of qualifying for food stamps, a household included a few unrelated individuals who lived with a traditional family to communally share expenses. But in *Village of Belle Terre v. Boraas*, 416 U.S. 1, 7-10 (1974) the Court upheld a zoning ordinance that excluded from the definition of family a community of six unrelated by blood, adoption, or marriage. Family at times is broad enough to stretch past blood relatives if people are living in the same household in a stable relationship. See *Borough of Glassboro v. Vallorosi*, 568 A.2d 888, 894-95 (N.J. 1990) (stating that ten college students who eat together, share expenses, and intend to remain a unit throughout college constitute the functional equivalent of a family); *City of White Plains v. Ferraioli*, 313 N.E.2d 756, 757-58 (N.Y. 1974) (stating that a family is a relatively permanent household which may include foster children).

167. There is, of course, an obstacle to formalizing the relationship if one of the cohabitants is still legally married. See, e.g., *Thomas v. LaRosa*, 400 S.E.2d 809, 814-15 (W. Va. 1990) (holding that a plaintiff can not recover from her cohabitant when he is already married). If the wage earner has failed to dissolve a previous marriage, he could find that he has incurred more responsibilities than his income can maintain. Even if he should divorce his previous wife, it is difficult for many wage earners to support more than one family at the same time. The problem is not resolved by deciding which family is legally entitled to support. Moreover, even if there is only one family to provide for, the available income may be inadequate. It is increasingly clear that private divorce and contract law do not resolve the underlying problem of women's situation, the fact that they are often dependents in both formal and informal relationships. Government needs to accept its responsibility to provide a workable scheme of social services and benefits to help families in need. See Deborah L. Rhode & Martha Minow, *Reforming the Questions, Questioning the Reforms: Feminist Perspectives on Divorce Law*, in *DIVORCE REFORM AT THE CROSSROADS* 191, 210 (Stephen D. Sugarman & Herma H. Kay eds., 1990) (arguing for expanded child care leave provisions, flexible workplace hours, wider pension coverage, retraining, and counseling programs).

time should be aware of the economic sacrifices a caretaker is likely to incur as a result of their informal living arrangements. If the relationship ends through death or separation, benefits and statutory entitlements or property and support awards should be made available.

Couples who prefer to live together without taking on the obligations of a marriage could enter into a contract stating that neither intends to be married. However, the woman, the one more likely to be economically vulnerable and to lack power in the relationship, might agree to enter such a contract only because she has no choice and fears the loss of the relationship if she does not waive entitlements, including ones available now—quantum meruit recovery for the value of the services. To protect caretakers, whose assent to a contract is suspect, the law should presume that the parties are married, despite an explicit agreement. This presumption should be rebuttable only in those cases in which there are no children, neither party is a full-time caretaker, and neither party has sacrificed a career opportunity to benefit the other.¹⁶⁸

If both parties really prefer not to marry, they are unlikely to raise children, live together for an extended period, or become economically dependent on each other. Therefore, neither party would have an incentive to pursue a claim when the relationship ends. Whenever the relationship takes on the appearance of a traditional marriage, it is surely more plausible to presume that the caretaker would choose to be married, but lacks the economic power to control the decision making in the relationship.

Although granting formal recognition monetizes the connection between the parties, it is an entirely different form of commodification than evaluating market services. Compensating the woman's labor minimizes the importance of the relationship and ignores the woman's values, whereas formal recognition enhances her self-worth and respects her dignity as a human being.¹⁶⁹ In fact, there is no way to avoid

168. See Kandoian, *supra* note 66, at 1863–64 (suggesting that after two years of cohabitation, the law should presume that the parties are married, rebuttable by proof of an express agreement to the contrary); see also *infra* note 193 (arguing that premarital and settlement agreements are subject to the same pitfalls as an agreement between cohabitants).

169. Formalizing relationships is a pragmatic solution that can further the empowerment of some women in a nonideal world. See Margaret J. Radin, *The Pragmatist and the Feminist*, 63 S. CAL. L. REV. 1699, 1700–01 (1990).

commodification. Both the compensation of market services and the refusal of all recovery denies that caring has any value. Rejecting her claim because of sexual intimacy reduces the woman to nothing more than the seller of a sexual commodity. All outcomes are evaluations of the importance we place on relational needs. The proposed change has the advantage of compensating the caretaker on her own justice scale of values. In this case, putting a dollar amount on the relationship is not self-reductive and does not mean that the self is only worth that amount.¹⁷⁰

Legitimacy, unfortunately, still does not provide a long-term caretaker and/or mother with much in the way of recovery if the relationship ends. Her inability to insist that the relationship be formalized because she is economically dependent on the wage earner is remedied, but not her underlying dependency. Placing the caretaker in the same situation that many wives face only underscores their common problem. Many women are raised to be caretakers and to see the world in relational terms,¹⁷¹ and many caretakers are vulnerable parties when relationships end.¹⁷² At the time of divorce, marriage becomes a business relationship between self-sufficient partners whose contributions

170. See Marjorie M. Schultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297, 336-37 ("The critical issue is not whether something involves monetary exchange as one of its aspects, but whether it is treated as reducible solely to its monetary features.").

171. See *supra* text accompanying notes 130-35.

172. The present state of family law does not acknowledge the disparity in economic strength between the parties and is a contributing factor to the feminization of poverty. See, e.g., Martha L. Fineman, *Implementing Equality: Ideology, Contradiction and Social Change*, 1983 WIS. L. REV. 789, 826-42 (arguing that the advent of no-fault divorce, and the model of marriage as an equal partnership, has led courts to look at the contributions each partner has made to the marriage in allocating property, instead of focusing on future needs); Glendon, *supra* note 101, at 707 (arguing that emphasizing autonomy and equality at divorce downplays the wage-earner's responsibility in a highly industrialized society, in which women are often exclusively devoted to child care and are dependent on the husband/wage-earner); Lenore J. Weitzman, *The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards*, 28 UCLA L. REV. 1181, 1251 (1981) [hereinafter Weitzman, *The Economics of Divorce*] (noting that in 1971 men in California experienced a 42% improvement in their standard of living following divorce, while women experienced a 73% loss). Her study has been reprinted and enlarged to include more recent findings. LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* (1985) [hereinafter WEITZMAN, *THE DIVORCE REVOLUTION*].

determine entitlements.¹⁷³ The justice model of reasoning prevails, and the woman is treated as if she were in the same position as the wage earner. Married or not, the rubric of contract clouds the substantive inequality of bargaining power between men and women and the disparity in their socioeconomic situations.¹⁷⁴ The various policy concerns that dominate the existing legal discourse in contract and family law do not grasp the reality of women's lives and fail to include women's values. Statutes regulating the family grow out of a background of gender-structured social institutions. Bargain theory is geared to the needs of the commercial setting, not the caretaker's world.

In light of the genderized nature of the caretaker's claim, I suggest that we welcome the nontraditional family into the positive law, without losing sight of the caretaker's economic plight. Along with accepting the many variations of the nontraditional family that exist in our society, we must also recognize the disadvantages of women's position in the traditional family and upgrade the value of the caretaking role. We need to remedy the substantive inequality in property and support awards at divorce and compensate all long-term caretakers and/or those with children, in traditional and nontraditional marriages, for the harm they have really

173. See, e.g., UNIF. MARRIAGE AND DIVORCE ACT § 307(a) (Alternative A), 9A U.L.A. 238-39 (1987) (stating that a court should consider "the contribution of the spouse as a homemaker or to the family unit" in apportioning property).

174. Employed wives still take on the burden of housework and child care. See OKIN, *supra* note 8, at 5; Glendon, *supra* note 101, at 707-08. Women are more likely to forego career opportunities after the birth of a child. During marriage many women gravitate towards low-paying jobs and work part-time. They remain economically dependent, even if they shoulder full-time responsibility in the workplace and in the home. On the job they continue to face discrimination. Even though they make up over 40% of the workforce, there is no national profamily policy in this country requiring employers to grant maternity benefits or to provide employees with paid parental leave. Working hours conflict with family needs, compelling women to choose between their careers and their families. See Finley, *supra* note 95, at 1125-28. Nationwide, women earn approximately 35% less than similarly employed men, and after four years in college earn the equivalent of men with an eighth-grade education. Mark A. Sessums, *What Are Wives' Contributions Worth upon Divorce?: Toward Fully Incorporating Partnership into Equitable Distribution*, 41 FLA. L. REV. 987, 995 n.27 (1989) (citing BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, 20 MONEY INCOME AND POVERTY STATUS OF FAMILIES AND PERSONS IN THE UNITED STATES IN 1987, at 7 (1987) and WOMEN'S BUREAU, U.S. DEP'T OF LABOR, 20 FACTS OF WOMEN WORKERS 2 (1980)). Fifty-four percent of all single-parent families in Florida live below the poverty level and more than 90% of these are headed by women. *Bias Study*, *supra* note 141, at 806.

suffered, the loss of the relationship.¹⁷⁵ The male metaphor of marriage as a partnership excludes a woman's ethic of care and the high value she ascribes to the relationship as one that will endure over time.¹⁷⁶ In long-term relationships, and in those relationships with children, the woman is more likely to be dependent and less able to become self-sufficient above a minimum level.

In jurisdictions which have adopted equitable distribution schemes, the courts have considerable discretion in the partitioning of assets. As a result, the property division in any given case will be unpredictable because it is based on the court's intuition of what is fair.¹⁷⁷ Because domestic work is

175. Evaluating relational loss has become to some extent an integral part of an established scheme of personal injury damages. In addition to allowing either spouse to recover for loss of consortium, some jurisdictions permit parents to recover compensation for loss of a child's affection and companionship. See, e.g., *Shockley v. Prier*, 225 N.W.2d 495, 501 (Wis. 1975). But a child's claim for loss of parental consortium is not well received. See, e.g., *Borer v. American Airlines, Inc.*, 563 P.2d 858, 865 (Cal. 1977). For a criticism of the refusal to expand the claim to include damages for lost society and companionship to parents, children, and spouses, see Jean C. Love, *Tortious Interference with the Parent-Child Relationship: Loss of an Injured Person's Society and Companionship*, 51 IND. L.J. 590 (1976). See also Lucinda M. Finley, *A Break in the Silence: Including Women's Issues in a Torts Course*, 1 YALE J.L. & FEMINISM 41, 48-51 (1989) (noting the discrimination against women in personal injury cases and the law's hostility to relational loss). The law does commodify relational loss, but only if there is physical injury caused by a third party and only within traditional family relationships.

An opposing perspective has been developed by Richard Abel. See Richard L. Abel, *Torts*, in *THE POLITICS OF LAW* 185, 195-96 (David Kairys ed., 1982) (arguing that the expansion of tort remedies for injuries to relationships commodifies love and implies that all relationships have a monetary value).

If one spouse abuses the other, some courts provide a special exception to interspousal immunity, permitting an alimony award to include any medical expenses or loss of earning potential. See, e.g., *Hill v. Hill*, 415 So. 2d 20, 24 (Fla. 1982). Separate tort actions for personal injury, but not for emotional distress, can also be pursued at divorce. See, e.g., *Chiles v. Chiles*, 779 S.W.2d 127, 131-32 (Tex. Ct. App. 1989). Physical injury indicates the degree of harm a woman is willing to endure to preserve the relationship and is a symptom of the woman's situation. Recognizing the loss of the relationship differs from these halfway measures. It is not a return to fault-based divorce, but an acknowledgment of the unequal division of labor in most marriages.

176. See *supra* text accompanying notes 87-90 (discussing a caretaker's loss of opportunities and belief that the relationship is permanent).

177. Suzanne Reynolds has studied the results of divorce reform in various equitable distribution jurisdictions. Although modern statutes direct courts to consider need as the appropriate determinant of property division and to turn to alimony if the assets are insufficient to provide for the economically vulnerable spouse, courts instead emphasize marital contributions, addressing need, if at all, through alimony awards. Suzanne Reynolds, *The Relationship of Property Division and Alimony: The Division of Property to Address Need*, 56 FORDHAM L. REV. 827, 870-71, 888-89 (1988); see also Mary Ann Glendon, *Family Law Reform in the 1980's*,

difficult to quantify, and not held in high regard, caretaker contributions are consistently underestimated. Without an established fair market value, the worth of domestic services becomes a matter of judicial valuation. Decisions lend themselves to gender bias. The percentage of marital property the woman receives is either far less than an equal amount or equal to the husband's share, despite her need for a greater award.¹⁷⁸ In some community property states, courts tend to favor the separate property concept in classifying what belongs to the marital community, and any increase in value of the separate property is retained by the owner. This usually results in the important income-producing assets remaining the property of the original owner, traditionally

44 LA. L. REV. 1553, 1556 (1984) (discussing equitable distribution schemes in general); Sessums, *supra* note 174, at 1028 (discussing equitable distribution awards in Florida).

Florida's equitable distribution statute does not mandate equal distribution. FLA. STAT. § 61.075 (1991). There is considerable discretion to award the caretaker less than half the assets if her contributions are considered to be of little value. *See, e.g., Lester v. Lester*, 547 So. 2d 1241, 1243 (Fla. Dist. Ct. App. 1989) (stating that awarding the wife one quarter of the estate is equitable because her role was "ornamental" in twenty-three years of marriage).

Martha Fineman suggests that women who are custodial parents be awarded the home because child support seldom reflects the actual costs of raising a child and support orders are rarely enforced. The most valuable, and often the only, asset at divorce is the family home. *See Fineman, supra* note 172, at 833. The costs of a college education are usually not a part of child support and many women, if able to do so, assume this burden. *Id.* at 829. As the costs of higher education increase and support awards decrease, however, fewer women will be able to manage. *Id.* Child support frequently fails to reflect the actual cost of paying someone to care for a child, because the custodial parent is awarded little or no maintenance and needs to work full-time. *See Weitzman, The Economics of Divorce, supra* note 172, at 1236-37.

178. Wives in Florida, for example, typically receive only their dower right, approximately one-fourth of the estate. Sessums, *supra* note 174, at 1009-10. The husband's contributions are more easily measured. Florida courts usually award as much as 65-75% of the marital assets to the husband. *See Bias Study, supra* note 141, at 816. In New York and New Jersey, equitable distribution standards usually result in women receiving less than one-half the assets. WEITZMAN, THE DIVORCE REVOLUTION, *supra* note 172, at 106-07. In states with a statutory presumption of equal distribution, wives are more likely to receive half the marital assets. *See Reynolds, supra* note 177, at 866-70. However, an equal division fails to substantively equalize the living standards of the parties. The older housewife, without skills or experience, needs a greater share of the assets to recapture the economic security she has lost by divorce. WEITZMAN, THE DIVORCE REVOLUTION, *supra* note 172, at 105. Equal division also works a hardship in community property jurisdictions. In California, courts frequently order the sale of the family home to accommodate the standard of equal division. *Id.* at 104. On the other hand, judges are reluctant to force the sale of a business, considering the wage earner's financial situation more important than the children's emotional and psychological need to remain in the family home. *Id.* at 97.

assumed to be the man.¹⁷⁹ In marital property regimes, the most valuable asset, the increase in the wage earner's earning potential during the years of the marriage, is often not divisible.¹⁸⁰ In general, men's earnings increase with age, peaking as men reach their fifties and sixties. Women, however, earn most of their income while they are young, twenty-five to thirty-five years old.¹⁸¹ Divorce before the male wage earner has achieved his full earning potential deprives the caretaker of her expectation to share in the increased wealth. Even worse, the woman past thirty-five

179. WEITZMAN, THE DIVORCE REVOLUTION, *supra* note 172, at 97. Weitzman reports that the shift from fault-based to no-fault divorce has scarcely affected the pattern of awarding the business to the husband. *Id.* A business, a professional association, or a corporation are often the family's main source of income. In Texas, profits from a separate business are community property, but any increase in the value of the business retains separate property status. See Bea A. Smith, *The Partnership Theory of Marriage: A Borrowed Solution Fails*, 68 TEX. L. REV. 689, 707-08 (1990). A separate asset brought into the marriage is also separate property, even if community funds or labor increased its value. *Id.* at 710. California's use of an equitable apportionment doctrine also tends to favor separate property. A substantial part of the profit and growth of a separate business can be classified as noncommunity property under this regime, leaving little to award to the community pool. *Id.* at 720-22.

180. See *Bias Study*, *supra* note 141, at 804 (noting that despite the gender-neutral language of Florida's divorce legislation, men generally receive more than half the marital assets and "typically leave with their enhanced earning capacity intact"). In a postindustrialized, highly specialized economy, wealth is not measured solely by the accumulation of property. An individual's earning capacity, the result of a significant educational investment and years spent on the job attaining practical skills, has replaced more traditional notions of wealth such as land, shares, and other tangible holdings. Courts, however, resist redefining property to include these new forms of wealth. See Smith, *supra* note 179, at 736-38.

For instance, some jurisdictions refuse to include the husband's enhanced earning ability, such as his professional degree or the goodwill of a business, when classifying marital property. See, e.g., *Jones v. Jones*, 454 So. 2d 1006, 1008-09 (Ala. Civ. App. 1984); *In re Graham*, 574 P.2d 75, 77 (Colo. 1978); *Sweeney v. Sweeney*, 534 A.2d 1290, 1291 (Me. 1987); *Hodge v. Hodge*, 520 A.2d 15, 16-17 (Pa. 1986); *Helm v. Helm*, 345 S.E.2d 720, 721 (S.C. 1986); *Beeler v. Beeler*, 715 S.W.2d 625, 626-27 (Tenn. Ct. App. 1986); *Martinez v. Martinez*, 818 P.2d 538, 540-42 (Utah 1991); *Hoak v. Hoak*, 370 S.E.2d 473, 476-77 (W. Va. 1988). But see *O'Brien v. O'Brien*, 489 N.E.2d 712 (N.Y. 1985) (holding that a medical license constitutes marital property).

Some jurisdictions refuse to recognize professional goodwill as a marital asset. See, e.g., *Powell v. Powell*, 648 P.2d 218, 222-23 (Kan. 1982); *Depner v. Depner*, 478 So. 2d 532, 533-35 (La. Ct. App. 1985), *cert. denied*, 480 So. 2d 744 (1986); *Nail v. Nail*, 486 S.W.2d 761, 763-64 (Tex. 1972). There are considerable differences over the definition of goodwill and how it should be valued. See 2 CLARK, *supra* note 147, § 16.5, at 199-203 (1987); see also WEITZMAN, THE DIVORCE REVOLUTION, *supra* note 172, at 124-29 (examining cases where one spouse supported the other while in professional school and explaining how different jurisdictions treated the degree upon divorce).

181. See *Bias Study*, *supra* note 141, at 815.

frequently has sacrificed her earning capacity to the well-being of the family.¹⁸² At divorce she is left in the worst position possible.

The metaphor of marriage as a partnership is needlessly confusing and causes women great harm. There is no entity in which the parties deposited their contributions except what is created, "thingified," by law. Courts fail to recognize that contribution is only need in disguise. Long-term domestic services prove the depth of the caretaker's dependence on the wage earner's stream of income, not her independence or ownership of financial assets as a partner.

The partnership metaphor also ignores many caretakers' inability to become self-sufficient when assessing their need for support. In most divorces, assets are limited to the family home and maintenance is the most certain means available to provide for the caretaker's future.¹⁸³ The years spent in the home without pay, at best acquiring market skills of minimal worth,¹⁸⁴ as well as the costs of child-rearing in the future because of inadequate and poorly enforced child support awards,¹⁸⁵ are not realistically taken

182. See *infra* note 184.

183. See *Bias Study*, *supra* note 141, at 816, 818 (stating that in most divorces there is little property to divide and alimony is one means to compensate for women's lost economic opportunities).

184. Mark Sessums observes that "[a] homemaker's earning capacity depends, in part, on the length of time she has placed her family at a higher priority than her career or education." Sessums, *supra* note 174, at 995 n.27. When a person is out of the labor force for any significant period of time, her job skills tend to "atrophy." Jacob Mincer & Solomon Polachek, *Women's Earnings Reexamined*, 13 J. HUM. RESOURCES 118, 118 (1978). Salary depreciation increases as the level of education rises. *Id.* at 121.

185. A man is rarely required to pay more than one-third of his net income for child and spousal support. Weitzman, *The Economics of Divorce*, *supra* note 172, at 1234. More than half the women awarded child support fail to receive it. WEITZMAN, *THE DIVORCE REVOLUTION*, *supra* note 172, at 262 (citing U.S. BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS, SERIES P-23, NO. 124, p.1 (1983)). One study revealed that two-thirds of fathers paid less for child support than they spent on monthly car payments. Lucy M. Yee, *What Really Happens in Child Support Cases: An Empirical Study of Establishment and Enforcement of Child Support Orders in the Denver District Court*, 57 DENVER L.J. 21, 36 (1979). Child support arrearages are easily forgiven and payments are routinely reduced. See *Bias Study*, *supra* note 141, at 825. Compelling payment, on the other hand, may require an attorney's services, the cooperation of an indifferent bureaucracy in the office of the State's attorney, and simply knowing where the father is located—all burdens on the custodial parent. See WEITZMAN, *THE DIVORCE REVOLUTION*, *supra* note 172, at 283-95; Nan D. Hunter, *Child Support Law and Policy: The Systematic Imposition of Costs on Women*, 6 HARV. WOMEN'S L.J. 1, 13-14 (1983).

into account. Permanent support requires proof of a special need, and most wives receive only temporary assistance.¹⁸⁶

In 1989, 858,000 children lived in households with two unmarried adults of the opposite sex; in 1990 the number rose to 891,000. U.S. BUREAU OF THE CENSUS, MARITAL STATUS AND LIVING ARRANGEMENTS: MAR. 1990, CURRENT POPULATION REPORTS, SERIES P-20, NO. 450 (1991). Despite these numbers, and although there is an equal right to support for illegitimate children, see *Gomez v. Perez*, 409 U.S. 535, 538 (1973), these children face special problems. When paternity actions end in settlement agreements, jurisdictions disagree as to whether the compromise binds all parties, including the child. See 1 CLARK, *supra* note 147, § 5.4, at 344-45. In contrast, the child support orders of previously married parties are always modifiable, even if based on agreements. *Id.* § 18.2 at 366-79. For a general discussion of the legal issues surrounding illegitimate children, see *id.* §§ 5.1-5.5. The Revised Uniform Reciprocal Enforcement of Support Act (RURESA) provides for an adjudication of paternity in the context of a RURESA proceeding. REVISED UNIF. RECIPROCAL ENFORCEMENT OF SUPPORT ACT § 27, 9B U.L.A. 381 (1968). However, the woman is often not present at the trial and is unable to effectively present her case or directly cross-examine the putative father since the proceeding occurs in the jurisdiction in which there is personal jurisdiction over the male obligor. See, e.g., *Hodge v. Maith*, 435 So. 2d 387 (Fla. Dist. Ct. App. 1983) (holding that, in an action under the Uniform Reciprocal Enforcement of Support Act, the alleged father's state of residence should resolve the issues of paternity and child support).

186. Lenore Weitzman's studies in California reveal that only 19% of divorced women in Los Angeles and San Francisco were awarded alimony in 1968. In 1977, after no-fault divorce statutes became widespread, the percentage had declined to 17. Weitzman, *The Economics of Divorce*, *supra* note 172, at 1221. The Uniform Marriage and Divorce Act states that maintenance should only be awarded if property is insufficient to provide for a spouse's needs and the spouse is unable to be self-supporting through employment or is the custodian of a child whose condition prevents the spouse from accepting employment outside of the house. UNIF. MARRIAGE AND DIVORCE ACT § 308(a), 9A U.L.A. 347-48 (1987). In Florida, courts are directed to decide on an alimony award only after the assets have been allocated. FLA. STAT. ch. 61.075(8) (1991). The women who receive permanent support are usually young mothers with small children and older women in long-term marriages who are unable to work because of age or poor health. Weitzman, *The Economics of Divorce*, *supra* note 172, at 1222. Weitzman's study also indicates, however, that these two groups have experienced a decline in support awards. *Id.* at 1222. One-third of the women who were full-time housewives in long-term marriages, and supposedly eligible for permanent maintenance, were not awarded any alimony. *Id.* In 1977, only 22% of mothers with minor children were awarded spousal support in addition to child support. *Id.* at 1225. The median time span on rehabilitative alimony was just over two years, hardly sufficient time to become self-supporting. *Id.* at 1226. In Florida, judges unrealistically assume a middle-aged woman will be able to obtain work, regardless of her educational background, length of marriage, or time away from employment. See *Bias Study*, *supra* note 141, at 814. Permanent alimony has been almost entirely discarded, even though women suffer a disproportionate impact on their future when property is used as the sole method of distributing marital assets. *Id.* at 816; see also Marsha Garrison, *The Economics of Divorce: Changing Rules, Changing Results*, in *DIVORCE REFORM AT THE CROSSROADS*, *supra* note 167, at 75, 83 (citing statistics proving a decline from 78% to 37% in awards of permanent alimony between 1978 and 1984 in New York); Reynolds, *supra* note 177, at 902 n.348 ("[I]n 1985 only 15% of ever-divorced or currently-separated women in the United States . . . received an award of alimony.") (citing

UNITED STATES DEP'T OF COMMERCE, BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS, SPECIAL STUDIES, SERIES P-23, NO. 152, *Child Support and Alimony: 1985 (Advance Report)*, p.6 (1987)). For a thoughtful recounting of the many disadvantages faced by women at divorce, citing numerous supportive studies, see OKIN, *supra* note 8, at 160-67.

Although the factors considered when awarding maintenance vary from jurisdiction to jurisdiction, Florida's statute is fairly representative. It states in pertinent part:

(1) In a proceeding for dissolution of marriage, the court may grant alimony to either party, which alimony may be rehabilitative or permanent in nature. In any award of alimony, the court may order periodic payments or payments in lump sum or both. The court may consider the adultery of either spouse and the circumstances thereof in determining the amount of alimony, if any, to be awarded. . . .

(2) In determining a proper award of alimony or maintenance, the court shall consider all relevant economic factors, including but not limited to:

- (a) The standard of living established during the marriage.
- (b) The duration of the marriage.
- (c) The age and the physical and emotional condition of each party.
- (d) The financial resources of each party, the nonmarital and the marital assets and liabilities distributed to each.
- (e) When applicable, the time necessary for either party to acquire sufficient education or training to enable such party to find appropriate employment.
- (f) The contribution of each party to the marriage, including, but not limited to, services rendered in homemaking, child care, education, and career building of the other party.
- (g) All sources of income available to either party.

The court may consider any other factor necessary to do equity and justice between the parties.

FLA. STAT. ch. 61.08(1)-(2) (1991).

Unlike a pure partnership model, Florida's statute reverts, in part, to fault to decide on support awards. For example, the statute allows the court to consider the adultery of either spouse when determining the amount of alimony. *Id.* ch. 61.08(1); *see also* Sessums, *supra* note 174, at 990 n.6. Because most women are not self-supporting, they are more likely to request alimony; thus, their past sexual conduct is more likely to be used against them. The statute appears to be gender-neutral, but like most gender-neutral rules, it is gender-biased in fact. Florida courts have refused to acknowledge the discrimination that underlies alimony determinations. *See, e.g.,* Pacheco v. Pacheco, 246 So. 2d 778, 782 (Fla. 1971) (holding that a denial of alimony due to adultery does not violate due process or equal protection), *appeal dismissed*, 404 U.S. 804 (1971).

Florida's focus on the woman's physical condition, age, and education is typical of the partnership approach. In effect, the wife has the burden to prove she is morally and physically worthy of an award. Florida's approach purports to reward the "good girl," the traditional woman, who cared for her family without developing independent market skills and who is an innocent party in the divorce action. But the reward is an illusion. Her contributions remain undervalued. If she varies from the traditional model of the good wife, she is punished, either for her fault-based conduct or for her failure to conform to the domestic contribution model. The factors listed

Older women and women with children are unlikely to find highly paid work.¹⁸⁷

in Chapter 61.08 describe perfect Stepford wives, what men want women to be, enlisting the law to compel them to conform to male expectations.

187. Over one-third of all divorces occur after 10 years of marriage and 20% involve those 45 and older. *Bias Study, supra* note 141, at 807. Most divorced women will work in service industries, for instance, as secretaries or clerks, waitresses or hairdressers. *Id.* at 815. Lenore Weitzman states the following:

[D]ivorce is a financial catastrophe for most women: in just one year they experience a dramatic decline in income and a calamitous drop in their standard of living. It is difficult to imagine how they survive the severe economic deprivation: every single expenditure that one takes for granted—clothing, food, housing, heat—must be cut to one-half or one-third of what one is accustomed to. No wonder that more divorced women report that they are in a constant financial crisis after divorce and that they are perpetually worried about not being able to pay their bills.

Weitzman, *The Economics of Divorce, supra* note 172, at 1252 (footnotes omitted). In 1980, the entire income of almost half of all separated and divorced women came from their own earnings. SUZANNE M. BIANCHI & DAPHNE SPAIN, *AMERICAN WOMEN IN TRANSITION* 206 (1986). Nationwide figures on the difference in income between men and women are alarming. The per-capita income of divorced women was 56% of the income of divorced men in 1980. BIANCHI & SPAIN, *supra*, at 30–32, 205–07, 216–18.

More than statistics, personal experiences bring home the gravity of women's situation. I have shared the pain of my friends, middle-aged women compelled to sell insurance from door to door, to open gift boutiques in the hope they can depend on their friends, or to attempt to rebuild a career abandoned years ago. College-educated, from middle-class backgrounds, they are caught in the transitional stages of a society that increasingly believes women are equal to men despite their lack of preparation to survive in a new world. They are deprived of their homes, their futures, and their dignity. These women are unlikely to remarry because of their age. See BIANCHI & SPAIN, *supra*, at 37 (stating that "[t]he younger the age at divorce, the greater is the probability of remarriage"). Even friendships end. Many of their friends have deserted them because the friendships developed from the husband's occupation and social status, and old friends now socialize with the ex-husband and his new wife. These women face an uncertain future alone.

When I describe the situation of these older women to my female students they tell me that they will not find themselves in the same position. The law has changed. There has been a substantial increase in women's rights. Moreover, women in their twenties have been raised in a different cultural environment than women in their forties. I then ask my students if they are or intend to be married and if they want to have children. Most see themselves as someday becoming mothers. They believe in a world in which it is possible for women to self-actualize both professionally and personally, and so do I.

Nevertheless, despite the gains that women have made during the past twenty-five years, including increased participation in the labor force and the passage of laws prohibiting gender discrimination, women still face substantial obstacles. Eighty percent of the women in the workforce are employed in low-paying jobs without benefits, such as clerical, retail, and service positions. Wendy Johnson, *Model*

The partnership metaphor also assumes that connections between the parties are capable of being severed. In truth, despite divorce, many relationships are effectively permanent because the parties are tied together by their children or by the caretaker's economic needs. Considering the numerous modifications and court appearances that can follow an initial decree, often the result of the wage earner's failure to pay child support,¹⁸⁸ there is no such thing, in many cases, as total dissolution.¹⁸⁹ In assuming that there is a complete severance, courts are inclined to view the man's standard of living as a constant, and if the resources of the parties are scarce, as is usually the case, the woman absorbs the loss instead of both equally bearing the brunt of less

Programs Prepare Women for the Skilled Trades, in WOMEN, WORK, AND SCHOOL: OCCUPATIONAL SEGREGATION AND THE ROLE OF EDUCATION 140, 140 (Leslie R. Wolfe ed., 1991) [hereinafter *WOMEN, WORK, AND SCHOOL*]. Women's access to traditionally male occupations, such as the skilled trades, is blocked. *Id.* at 143. Even in unions with a high percentage of women members, leadership positions in unions are generally held by men; these union officials frequently work with employers to preserve gender barriers. EPSTEIN, *supra* note 131, at 151. Women who enter high-prestige professions receive subtle hints that they are welcome only in lower echelon positions of little power. *Id.* at 155-56. For a survey of gender bias in the corporate world, science, medicine, and the law, see *id.* at 153-64.

Women face societal barriers from an early age. The school system reflects and contributes to stereotypical notions of the social roles of males and females. Studies indicate that teachers interact more with boys than girls. For example, they praise boys more frequently and are more likely to ask boys complex and abstract questions. David Sadker & Myra Sadker, *Sexism in American Education: The Hidden Curriculum, in WOMEN, WORK, AND SCHOOL, supra*, at 57, 58.

Most importantly, however, our culture persists in maintaining a society in which women's lives are organized around child care. See BIANCHI & SPAIN, *supra*, at 103-08 (examining the increase in the number of families maintained by women). As long as this factor is present, women's choices are constrained and their individual aspirations are curtailed.

188. See WEITZMAN, *THE DIVORCE REVOLUTION, supra* note 172, at 285-95.

189. Unlike the American model, in which support awards must be modified by expensive court actions, in France, West Germany, Sweden, and other European countries, child support rises automatically with the cost-of-living index. MARY ANN GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* 88 (1987). Moreover, in these countries there is a positive social policy stressing the importance of family needs. The state bears the risk of collecting unpaid child support, and the custodial parent is advanced the amount due. *Id.* at 89. Because of the many public benefits and services, the income differential between men and women is significantly less in continental Europe than in the United States. An unmarried, unemployed mother of two in the United States lives on half the average American production worker's wage, whereas her European counterpart lives on 67-94% of an average production worker's wage. *Id.* at 90.

income.¹⁹⁰ The woman's decline in living standard can be even greater because she often takes on the actual costs of raising the children.¹⁹¹

The permanent financial connection between the parties needs to be recognized, and the wage earner held responsible for the caretaker's loss.¹⁹² Compensating relational loss, instead of measuring contributions, more accurately depicts the reality of divorce, and protects those who are unable to protect themselves in contract or status. Unless there is a restructuring of the division of labor, including the degenderization of child care, and until workplace expectations are regulated to allow for family responsibilities, the caretaker's dependence on the relationship in traditional and nontraditional marriages should be presumed at the time of dissolution so as to reflect existing socioeconomic conditions. In addition, courts should presume that an express prenuptial or settlement agreement in which a long-term caretaker or mother waives maintenance or any other family rights is unconscionable. To allow the agreement to control ignores the disparity in bargaining power which allows the male wage-earner to impose unfair terms on the woman.¹⁹³

190. See Reynolds, *supra* note 177, at 911.

191. See *supra* note 185.

192. See, e.g., Smith, *supra* note 179, at 743 (suggesting a theory of marital enterprise liability, basing awards on detrimental reliance). Margaret Brinig and June Carbone turn to the Restatement (Second) of Contracts for breach of contract remedies, measuring losses incurred in reliance on the marital contract. At divorce, the losses include the woman's sacrifice of her career and foregone opportunities to enter into another marriage. See Margaret F. Brinig & June Carbone, *The Reliance Interest in Marriage and Divorce*, 62 TUL. L. REV. 855, 870-71 & nn.69-70 (1988); see also RESTATEMENT (SECOND) OF CONTRACTS § 344(b) (1981).

Considering the annual divorce rate and the fact that every year divorce affects the lives of more than three million people in the United States, OKIN, *supra* note 8, at 160, divorce insurance might not be a bad idea. However, the men who tend to avoid their obligations after a divorce are also unlikely candidates to voluntarily procure insurance.

193. In cases involving cohabitants, a presumption of unconscionability is particularly apt. See Kandoian, *supra* note 66, at 1842 (commenting that one "has to be concerned about the exercise of power that led to the informality of their arrangement" in the first place); see also Newman v. Newman, 653 P.2d 728, 735-36 (Colo. 1982) (holding that a waiver of all support in a prenuptial agreement is voidable if unconscionable). But see Del Vecchio v. Del Vecchio, 143 So. 2d 17, 20 (Fla. 1962) (holding that as long as the wife understood her rights, signed voluntarily, and had full disclosure of her husband's assets, the provisions in the prenuptial agreement were enforceable).

Settlement agreements need to be scrutinized by the courts before the terms become a part of a judgment. Caretakers are often vulnerable to economic concessions,

Instead of separating property and support into two piecemeal dispositions, one comprehensive scheme of recovery is all that is required. All assets should be family property.¹⁹⁴ The family's resources, regardless of the time or the source of acquisition, including property held before marriage (or before living together), devises, bequests, and gifts, as well as the spouses' earning potential and nonvested and vested pension rights, are to be pooled into a common fund. When allocating resources, courts attempt to establish the same standard of living for both parties in the future.¹⁹⁵ The caretaker, as the mainstay of the household, should be given the recognition her role implies and not be required to prove her entitlement.

fearing a child custody battle if the case proceeds to trial. See WEITZMAN, *THE DIVORCE REVOLUTION*, *supra* note 172, at 310-18; see also *Bias Study*, *supra* note 141, at 819 (reporting that attorneys testified before the Commission that men threaten custody as a bargaining tool and that this is "standard practice"); Richard Neely, *The Primary Caretaker Parent Rule: Child Custody and the Dynamics of Greed*, 3 YALE L. & POLICY REV. 168, 177-78 (1984) (describing a case in which an attorney counseled a husband to threaten a custody fight in order to achieve a better settlement). Men's and women's values also play a role in negotiation. Men tend to be focused on the money issues and on their rights. Because women prefer to maintain a positive relationship after divorce and often depend on the male's willingness to pay for future support, they are more willing to compromise in reaching a settlement. Also, women are likely to devalue their contributions, agreeing to less than their legal entitlements. See WEITZMAN, *THE DIVORCE REVOLUTION*, *supra* note 172, at 313; see also GLENDON, *supra* note 189, at 96 (arguing that the greatest harm occurs in private ordering, 90% of all divorce cases, and that negotiations would change if both parties knew that courts would act in the interests of the children).

194. Mary Ann Glendon proposes that marital and nonmarital assets be commingled as family property to provide for the needs of minor children. Glendon, *supra* note 177, at 1559. But a childless caretaker or one with adult children who has devoted the greater part of her life to her family is equally entitled to family assets. In long-term relationships, couples tend to pool their combined resources, including gifts, bequests, and devised property. They are unlikely to think in terms of "yours" and "mine." They share what is acquired for the benefit and utility of the family unit. Even in two-career marriages, one career often plays a secondary role. One income is used for expenses so that the other is available for investment purposes. Both, however, expect to enjoy the fruits of the property acquired. See Susan W. Prager, *Sharing Principles and the Future of Marital Property Law*, 25 UCLA L. REV. 1, 13 (1977).

195. See Reynolds, *supra* note 177, at 911-12 (proposing that courts equalize the post-divorce standard of living of both parties); see also WEITZMAN, *THE DIVORCE REVOLUTION*, *supra* note 172, at 390 (arguing that with regard to older women, support rules should aim to equalize the standards of living of the two parties after divorce). Weitzman favors four presumptions at divorce following a long marriage: a presumption that future earnings and earning capacity are marital assets, a presumption that these assets should be shared, a presumption that support awards should equalize the living standards of the parties, and a presumption of permanent support. *Id.* at 390-93.

Housework and personal services, which epitomize the woman's altruistic caring as an expression of her value system, created and sustained the family at the caretaker's expense. Permanent maintenance should become the established norm, with the wage earner assuming the burden to prove an exception. A short-term marriage, without children, in which the caretaker has not sacrificed her potential career to the relationship, is one example of a potential exception.

Because there is no meaningful distinction between alimony and child-support awards, as both are used to meet family needs, support is more accurately classified as family payments. To ensure that the caretaker lives at the same level as the wage earner in the future, the presumption of dependency allows for permanent support in most cases. If the resources are unable to preserve the marital standard of living, both should share equally in the decline in living standard. The husband's financial future is effectively tied to the caretaker's needs, honoring a woman's relational ethic of care and the extent of her loss. The caretaker's values are thus brought into what we now can justly describe as family law.

B. *The Need for Co-Parenting*

In suggesting various legal reforms, I am mindful that the economic disadvantages inherent in the caretaker role are not resolved. The family/market dichotomy socially reproduces itself by women raising daughters who are dependent on men.¹⁹⁶ Moreover, celebrating women's values can be deceptive, a "false consciousness"¹⁹⁷ that ensnares women to welcome their own dependency.¹⁹⁸ Formalizing de facto

196. See *supra* note 134 and accompanying text.

197. By "false consciousness," I refer to the notion that oppressed groups at times experience the world through the dominant cultural ideology and thereby are deluded into accepting the terms of their own domination. See, e.g., Alan Freeman, *Racism, Rights and the Quest for Equality of Opportunity: A Critical Legal Essay*, 23 HARV. C.R.-C.L. L. REV. 295, 322-23 (1988) (suggesting that people's experiences of the world may sometimes be distorted by "the prevailing structures of thought").

198. Catharine MacKinnon insists that women value caring because they are dependent on men: "[M]en have valued women according to the care they give." MACKINNON, *supra* note 5, at 51. Hence, to MacKinnon, the ethic of care is not a woman's value and is in fact masculine at its core. She asks the following:

Why do women become these people, more than men, who represent *these* values? . . . For me, the answer is clear: the answer is the subordination of

marriages and creating presumptions of dependency seemingly further the institutionalization of genderized social roles.¹⁹⁹ But to refuse all relief could be even worse.²⁰⁰

The current state of divorce law partially attempts to take women's dependency into account through equitable distribution or community property schemes. In addition, in nontraditional marriages, courts sympathetic to the caretaker, aware that she lacks saleable skills and is unable to compete in the market in the same way as her male partner, compensate her labor through the device of finding that she acted with an

women. That does not mean that I throw out those values. Those are nice values; everyone should have them. I'm not saying that taking these values seriously would not transform discourse The articulation of the voice of the victim is crucial because laws about victimization typically are made by people with power

James McCormick Mitchell Lecture, supra note 4, at 74; see also Radin, supra note 90, at 1930 n.279, 1932 n.286 (observing that a surrogate mother might actually be reinforcing oppressive gender roles even though the surrogate subjectively feels she is behaving altruistically).

199. I am aware that presumptions of dependency foster an image of women as weak and helpless, incapable of surviving without men. From my perspective, however, divorce law should reflect reality and operate to alleviate the distress of women who are dependent in fact. In the past, some feminists have argued against special rights for women, such as maternity leave policies, and in favor of equal rights for similar reasons, disliking and fearing gender-specific laws that perpetuate neo-Victorian images of women. See Finley, *supra* note 95, at 1145-46. The special treatment versus equal treatment debate translates into nothing more than a disagreement over rhetoric: whether we prefer the portrayal of women as essentially the same as men or different from them, possessing unique needs. For a further discussion of this debate, see *id.* at 1142-63.

Insisting on formal equality instead of result equality does not alter patriarchy. In real life, women are not similarly situated to men and lack both economic opportunities and power. The special needs of women are not innate characteristics of gender; rather, they are artifacts of hierarchy. Acknowledging that some women are dependent, and thus that the presumption is grounded in fact, allows the socioeconomic position of these women to be included in the discourse. The presumption is *not* a description of any essential characteristic of womankind.

200. In her discussion of prostitution and surrogate mothering, Radin calls this choice the "double bind":

If we now permit commodification, we may exacerbate the oppression of women—the suppliers. If we now disallow commodification—without what I have called the welfare-rights corollary, or large-scale redistribution of social wealth and power—we force women to remain in circumstances that they themselves believe are worse than becoming sexual commodity-suppliers. . . . This dilemma of transition is the double bind.

Radin, *supra* note 90, at 1916-17 (footnotes omitted); see also Radin, *supra* note 169, at 1701-04 (characterizing the double bind as a "problem of transition" resolved by pragmatic decisions as we progress towards a new vision of the meaning of gender).

expectation of a reward. All these methods of compensation end in awarding women little more than quantum meruit. Openly acknowledging women's dependency, in traditional and in nontraditional relationships, is more effective, providing a better understanding of women's social position and more compensation to meet their needs. To protect all caretakers and to allow their voices as victims to be heard, we should compensate the actual loss, that is, the relationship itself.

To change the underlying inequality itself, we need to create an environment in which it is possible to structurally redefine social roles within the family so that men and women share parenting and domestic responsibilities. Co-parenting helps position women on a more equal footing with men in the market, and thereby makes them less dependent on a relationship to survive.²⁰¹ In so doing, we do not lose the ethic of care that has developed out of women's situation. Women's values need not be to their disadvantage or unique to gender. Co-parenting could make it possible for maleness also to mean connection because the male primary caretaker would be internalized as a part of the young male self, in the same way that the female caretaker is internalized by the female child.²⁰² It could help transform the engrained ambivalence

201. Co-parenting ends the double bind. The state of the law regarding women closely resembles the limited choices faced by workers during the *Lochner* era, during which employees were in a double bind. At that time, people believed that an employee was always free to refuse an unfavorable employment contract. Peller, *supra* note 3, at 1195. Proponents of *Lochner* saw individuals as totally autonomous free agents, who create the social conditions in which they live. *Id.* at 1208-09. Today, however, we view the employee's choice as constrained by the need to support a family, by the organization of the labor market in the industry, and by the employee's socioeconomic position. *Id.* at 1195. Women face a similar dilemma: because they have the responsibility of raising children, their choices are limited.

202. Men who co-parent today, however, typically have been raised by women and do not easily shake the gender-differentiated aspects of their upbringing. See DIANE EHRENSAFT, *PARENTING TOGETHER: MEN AND WOMEN SHARING THE CARE OF THEIR CHILDREN* 93-95 (1987). As a result, in keeping with Chodorow's theory, "women 'are' mothers while men 'do' mothering." *Id.* at 94. But the children who are raised by both parents seem to exhibit a balance of female and male gender role identities. Male children, as well as female, show a significant capacity for empathy and an ability to interrelate. *Id.* at 236-37; see also Abraham Sagi, *Antecedents and Consequences of Various Degrees of Paternal Involvement in Child Rearing: The Israeli Project*, in *NONTRADITIONAL FAMILIES: PARENTING AND CHILD DEVELOPMENT* 205, 217-23 (Michael E. Lamb ed., 1982) [hereinafter *NONTRADITIONAL FAMILIES*].

We understand the psychological importance of the father's presence to children at the time of divorce. Courts encourage frequent visitation and have abrogated the tender years presumption, at times even awarding the father physical custody of young children. Ironically, we tend to overlook the importance of the male role model before divorce, although that is when it is easier to share responsibility. Some feminists advocate shared parental and domestic responsibility. See, e.g., CHODOROW,

surrounding altruism. More children would be enabled to mature relationally and experience giving without a fear of loss.²⁰³ The tendency to downgrade women would play less of a role in the development of masculinity. I am suggesting that genderized child care breeds incomplete human beings, halfings. Many men are individuated, but are overly dependent on women for emotional sustenance and afraid to concede to deeply felt affective needs. Many women are in tune with relational needs, but are insufficiently individuated.²⁰⁴ What is at stake is the liberty of both men and women to pursue a livelihood without denying the fundamental importance of relational needs.

However, a general social acceptance of shared parenting and the necessary changes that need to be introduced into the workplace²⁰⁵ require an acknowledgement of relational

THE REPRODUCTION OF MOTHERING, *supra* note 7, at 218; EHRENSAFT, *supra*, at 257-58; and OKIN, *supra* note 8, at 171.

203. I do not mean to suggest that nontraditional families are deficient for the purpose of raising children. The absence of a father as a role model in families in which both sexes are raised by women should not necessarily cause problems for children. See RHODE, *supra* note 8, at 145 (contending that gays and lesbians are the same as heterosexuals in terms of intimacy, caring, and affection); Regina Austin, *Sapphire Bound!*, 1989 WIS. L. REV. 539, 566 (criticizing the mainstream condemnation of black unwed motherhood as a variant of patriarchy). Nontraditional families are not by definition incapable of raising healthy children. Indeed, I believe that it is the pathology of the traditional family in its insistence on rigid, hierarchical social roles that breeds emotional problems in future generations.

204. See *supra* note 150.

205. At least one country has already introduced such changes into the workplace. In Sweden, legislation grants 180 days a year leave of absence with 90% of income to either parent after the birth of a child. A father or a mother is also entitled to 180 days leave per year to care for a child up through the child's first year in school. Fathers may also take ten days leave immediately following the mother's hospitalization to care for the older children and to share in newborn responsibility. Parents may work a six-hour day until the children are past the age of eight. Either is entitled to 60 days a year for caring for sick children. Employers are compelled to guarantee a return to employment without retaliation to any parent who utilizes the parental leave plan. See Finley, *supra* note 95, at 1173-74; Michael E. Lamb et al., *Varying Degrees of Paternal Involvement in Infant Care: Attitudinal and Behavioral Correlates*, in NONTRADITIONAL FAMILIES, *supra* note 202, at 117, 117-18. Despite the legislation, however, few fathers have taken advantage of the option. *Id.* at 118.

Currently there is a bill pending in our Congress that would entitle employees to family-related leave (twelve work weeks during any twelve-month period) upon the birth or adoption of a child and in order to care for a "son, daughter, spouse, or parent of the employee who has a serious health condition." S. 5, 102d Cong., 1st Sess. § 102(a)(1)(C) (1991). The Swedish caretaker has a right to full-time leave every year until the child reaches one and a half years of age, and reduced working hours until the child is eight years old. Finley, *supra* note 95, at 1173-74. The proposed congressional legislation, however, requires that the child suffer a serious physical illness in order for additional leave to be granted. S. 5 § 102(a)(1)(C). What

needs. These needs are given minimal worth as long as child care remains genderized and undervalued.²⁰⁶ Moreover, hierarchical social roles within the family are but one aspect of the many pervasive systemic constraints on women, reproduced not just in the family, but in all of our cultural, political, and economic institutions. Without eradicating the overall exploitation of women and reconceptualizing social roles free of gender bias, relational needs and caring will continue to be undervalued.

We must begin somewhere to break the cycle which reproduces domination. We should encourage enabling legislation that facilitates co-parenting and requires the workplace to become responsive to the importance of the family, instead of creating conflicts between men and women.²⁰⁷ A workplace

remains unrecognized is the child's emotional need for the caretaker's presence, vital to the growth of a healthy child. The leave is not necessarily paid for by the employer, and the Act excludes businesses with fewer than 50 employees. *Id.* §§ 101(5), 102(c)(d). The Act will not benefit many families, and does not necessarily genderize parenting. Nonetheless, it represents a first step. Instead of defining an individual in terms of his or her job, there is some recognition of the person as a part of a family.

206. Day-care workers are a good example of the low value given to the caretaking role. In one salary reevaluation study, zoo keepers were assigned higher wage levels than those who care for our children because the skills of the former are "acquired," not "innate." See Deborah L. Rhode, *Occupational Inequality*, 1988 DUKE L.J. 1207, 1231.

207. Because co-parenting is not a widely considered alternative, and women's position is still seen by many as "naturally" in the family, workplace policies tend to adopt a male profile on health benefits. Attempts to accommodate women in the workforce, such as pregnancy leave, should not be seen as discrimination against men, but as meeting the needs of both men and women, whose family lives are of great value. See Finley, *supra* note 95, at 1165-81; see also California Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 292 (1987) (holding that a California statute requiring employers to provide pregnancy disability leave and to reinstate employees returning from such pregnancy leave is not preempted by or inconsistent with Title VII of the Civil Rights Act of 1964).

Equal protection should not mean a theory of exceptions from what is the male norm, but a recognition of the different needs that enhance our lives together. The workplace should be safe for women as well as men. In a recent decision, the Supreme Court held that an employer's fetal protection policy excluding women of child-bearing ability from jobs which require exposure to lead was facially discriminatory, in violation of Title VII. *UAW v. Johnson Controls, Inc.*, 111 S. Ct. 1196, 1207-08 (1991). Gender bias in the workplace is not removed, however, nor is the family protected, by giving women the right to work in a hazardous environment. *Johnson Controls* grants women the right to risk their procreative functions, hardly a desirable solution for the women involved. The decision represents the failure of equal rights analysis to address the real-life problems of women. What women workers need is a workplace free of environmental hazards, not the right to "choose" between sterilization in order to work and sterilization as a result of work.

The legislative failure to promote the policy of co-parenting leads to half-way measures such as Felice Schwartz's suggestion that companies establish separate

obliged by law to consider the needs of the family would help to alleviate women's present situation and could provide the basic framework for a more ideal future, a degenderized society. Furthermore, in working together to redefine the family by including its neglected members, we begin to reverse the hierarchy of values implicitly weighed in the law and to express a new collective ethic. We, as a society, can choose to value caring more than commerce and can insist that the family be in the forefront of the market.

CONCLUSION

In *The Fall*, the lawyer's failure to rescue is not callous indifference. Beneath the pose of cynicism, there is more than the lack of simple, masculine, heroic courage. What he fears is not just the annihilation of his physical existence. The risk is to his conception of self. His fear of submerging himself in the cold waters of the Seine and embracing the drowning woman is the same fear of intimacy he has experienced with all the women he encountered in his life.²⁰⁸ According to

paths for career-oriented women and for women who want to combine career and family. Felice N. Schwartz, *Management Women and the New Facts of Life*, 67 HARV. BUS. REV. 65 (1989). Schwartz's proposal, dubbed the "Mommy Track," has been criticized for advocating that women who want families should accept second-class career status and second-class salaries. See, e.g., Audrey Freedman, *Those Costly 'Good Old Boys'*, N.Y. TIMES, July 12, 1989, at A23. No one considers "Daddy Tracking" because we assume that child care is a woman's responsibility. Even law school curricula indirectly educate law students to ignore the value of the caretaking role by placing more importance on business courses than family law. We need to sensitize future lawyers to these concerns. As Catharine MacKinnon put it:

In reality . . . virtually every quality that distinguishes men from women is already affirmatively compensated in this society. Men's physiology defines most sports, their needs define auto and health insurance coverage, their socially designed biographies define workplace expectations and successful career patterns, their perspectives and concerns define quality in scholarship, their experiences and obsessions define merit, their objectification of life defines art, their military service defines citizenship, their presence defines family, their inability to get along with each other—their wars and ruler-ships—defines history, their image defines god, and their genitals define sex.

CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED* 36 (1987) (footnote omitted). To be of comparable worth, a woman must be both male and female. A man need only be himself.

208. See CAMUS, *supra* note 1, at 57–59.

Freud, birth is often represented in the unconscious by water symbols and in connection with acts of rescue.²⁰⁹ Dreams or fantasies of emerging from water refer to one's birth. The significance of rescue varies, however, depending on whether the rescuer is a male or female. To a woman, rescuing another from the water is an act of mothering.²¹⁰ To a male, saving a woman from drowning means that he has made her his mother.²¹¹ For the lawyer, and for the law, to dare to take the plunge is to risk drowning and regressing to childhood, a state of dependency and merger that is the ultimate loss of self.

Redefining the family and recognizing relational loss can lead to a change in the consciousness of self, a social construct re-presented and partially formed by law. In acknowledging the caretaker's role in society, we deliberate on the importance of companionship and intimacy, the altruistic gift of care needed in everyone's life, and heighten a shared sense of common humanity. We foster a holistic approach to justice, instead of a narrow focus on the physical labor involved. The dominant masculine voice of detachment is supplanted by the feminine. The caring voice is heard. Restructuring parenting and degenderizing social roles become realistic possibilities if the law insists that we are responsible for each other.

Although the legal system is a reflection as well as a determinant of dominant cultural beliefs, and its rhetoric can depersonalize and separate us, it can at times transcend the climate in which it exists and provide guidance for a change in values. Through its moral teaching function, and out of a respected tradition of influence, law's transformative power can effectuate social change. Rewarding the caretaker's altruism will enable us to express a new discourse of empathy and responsibility, helping us to realize our full potential as interrelated human beings.

209. For a more complete discussion of Freud's interpretation of water and rescue symbols, see SIGMUND FREUD, *THE INTERPRETATION OF DREAMS* 272-73, 275 (A.A. Brill trans., The Modern Library 1950) (1913); SIGMUND FREUD, *Contributions to the Psychology of Love*, in *SEXUALITY AND THE PSYCHOLOGY OF LOVE* 49, 57 (Philip Rieff ed., 1963) [hereinafter FREUD, *Contributions to the Psychology of Love*].

210. FREUD, *Contributions to the Psychology of Love*, *supra* note 209, at 57. For example, the Pharaoh's daughter became the mother of Moses after rescuing him from the Nile. *Id.*

211. *Id.*

What can one do to become another? Impossible. One would have to cease being anyone, forget oneself for someone else, at least once. But how?²¹²

How the one becomes more than oneself is initiated in the family. Redefining and valuing the family's needs are tasks within our grasp and remain our greatest moral responsibility.

212. CAMUS, *supra* note 1, at 144-45.